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## Chapter 14. THE HAGUE EVIDENCE CONVENTION: HOW IS IT REALLY WORKING?

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### I. Introduction

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)<sup>1</sup> has been the subject of much scholarly commentary,<sup>2</sup> yet there is relatively little empirical evidence on how well the Convention actually works.

The International Litigation Committee (ILC) of the Section of International Law (SIL) of the American Bar Association recently had occasion to gather information on the practical operation of the Hague Evidence Convention. The project was set in motion in December 2002, when the Nineteenth Diplomatic Session of the Hague Conference on Private International Law (Hague Conference)<sup>3</sup> elected to convene a Special Commission to review the practical operation of the Hague Evidence Convention. The Special Com-

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<sup>1</sup>Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 3 U.S.T. 2555, T.I.A.S. No. 744, 28 U.S.C.A. § 1781.

<sup>2</sup>Extensive bibliographies concerning the Hague Evidence Convention can be found on the websites of the Bureau of Consular Affairs of the U.S. State Department (<http://travel.state.gov/hague-evidence.html>) and the Hague Conference on Private International Law (<http://hcch.e-vision.nl>).

<sup>3</sup>Despite its name, the Hague Conference on Private International Law is not an event, but rather a permanent intergovernmental organization based in The Hague, in the Netherlands, which negotiates and drafts multilateral treaties or "conventions" in various fields of private international judicial cooperation. See David McClean, International Co-Operation in Civil and Criminal Matters 5 (2002) (the Hague Conference's "title conceals the fact that it is an inter-governmental or-

mission met in The Hague from October 28 to November 5, 2003. The last such Special Commission was convened in 1989.<sup>4</sup>

In preparing for the meeting of the Special Commission, the Assistant Legal Adviser for Private International Law of the U.S. State Department requested input from practicing lawyers in order to identify issues that should be raised at the Special Commission.<sup>5</sup> Accordingly, the ILC initiated a survey to elicit feedback from American litigators concerning their experience with the letter of request procedures under the Hague Evidence Convention. This article summarizes the results of the ILC survey, together with other available information concerning the practical operation of the Hague Evidence Convention, and discusses the outcome of the Special Commission meeting.

## II. Background

Before discussing the survey, it is useful to provide some background on the Hague Evidence Convention.

### A. The Hague Evidence Convention

There are presently 42 contracting states to the Hague Evidence Convention; among them Australia, China, France, Germany, Israel, Italy, Mexico, the Netherlands, South Africa, Spain, Switzerland, the United Kingdom, and Venezuela.<sup>6</sup> Judicial assistance is available under the convention with respect to "civil or commercial matters." Chapter I of the Convention establishes a system of

organization as significant in its field as, for example, the World Intellectual Property Organization"). After preparatory research is conducted by the Permanent Bureau of the Hague Conference, preliminary drafts of the conventions are drawn up by "Special Commissions" consisting of experts designated by the 64 member states of the Hague Conference. The drafts are then discussed and adopted at a plenary diplomatic session of the Hague Conference. Special Commissions are also convened from time to time to review the practical operation of existing Hague conventions. In the latter instance, the Special Commission will seek to harmonize the interpretation of the convention among member states through the preparation and issuance of "practical handbooks" and reports, which are sometimes relied upon by courts as persuasive authority.

<sup>4</sup>See Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 I.L.M. 1556 (1989).

<sup>5</sup>Assistant Legal Adviser Jeffrey D. Kovar undertook this initiative and also headed the U.S. delegation to the Special Commission.

<sup>6</sup>A complete list of member nations, together with their declarations, reservations and sample forms, is available on the website of the Hague Conference on Private International Law ([http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=82](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=82)), and in various other sources, including, for instance, the Martindale-Hubbell International Law Digest.



obtaining evidence through "letters of request," which are requests from a "judicial authority" for the purpose of "obtain[ing] evidence which is . . . intended for use in judicial proceedings, commenced or contemplated."<sup>7</sup> Chapter II of the convention provides for the taking of evidence from voluntary witnesses by diplomatic officials or commissioners. The focus of this paper is solely upon the Chapter I letter of request procedures.

The convention procedure for letters of request is implemented in the United States by 28 U.S.C.A. § 1781, and the text of the Convention, together with a form letter of request, can be found in the notes to that provision. A lawyer seeking evidence under the convention files a motion with the court in which the action is pending, together with a draft letter of request. The requisite contents of the letter of request are set forth in Article 3 of the convention—the names and addresses of the parties and their representatives; the judicial authority requesting the information; a description of the nature of the action; and a description of the evidence to be obtained, including the name and address of the party to be examined, the questions to be propounded to the witness or a general description of the subject matter of the examination, and the documents or property to be inspected. Article 4 requires that the letter be written in the language of the state of execution or accompanied by a certified translation, unless that state has agreed to accept a letter in English or in French. Article 7 provides that the requesting court, if it so desires, shall be informed of the time when, and the place where, the witness examination will take place, in order that the parties and their representatives may attend. If so indicated in the letter of request, this information is sent directly to the parties or their counsel. There is no need for legalization of the letter, authentication through an apostille, or similar formality.

Each signatory designates a "central authority" to receive letters of request and oversee their execution. The requesting court submits the letter of request directly to the foreign central authority which, in turn, forwards it to the appropriate foreign court to obtain the requested evidence. It is then returned via the same route. Article 9 of the convention provides that a "Letter of Request shall be executed expeditiously," but sets no precise time limit. According to Article 10, compulsory process is available against recalcitrant witnesses "in the instances and to the same extent as are provided by [the foreign state's] internal law" for domestic proceedings. Article 12 provides that the execution of a letter of request may be refused only to the extent that "(a) in the state of execution the execution of the letter does not fall within the functions of the judiciary, or (b) the state of execution considers that its sovereignty or security would be threatened." Execution may not be refused on the ground

<sup>7</sup>Hague Evidence Convention, art. 1.

that the foreign country claims exclusive jurisdiction over the subject matter of the action or that its internal law does not provide for such a cause of action.

From the perspective of an American lawyer, a major constraint on the utility of the convention is Article 23, which permits any contracting state to declare that it will not execute a letter of request issued "for the purpose of obtaining pretrial discovery of documents as known in common law countries." Most signatories to the convention have made some form of Article 23 declaration, and obtaining documents from many countries is effectively precluded. Notwithstanding Article 23, however, a number of contracting states—including, for instance, France, Mexico, the Netherlands, and the United Kingdom—will, to varying degrees, compel the production of documents that are identified in the request with a high degree of specificity.

### B. The *Aerospátiale* case

In *Societe Nationale Industrielle Aerospátiale v. United States District Court*,<sup>8</sup> the U.S. Supreme Court considered whether the Hague Evidence Convention preempts the Federal Rules of Civil Procedure when obtaining evidence from abroad. In deciding this issue, the Court was faced with a choice between at least four different interpretations: (1) the convention "might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence from abroad is sought for use in an American court";<sup>9</sup> (2) the "Convention might be viewed as establishing a supplemental set of discovery procedures" that are "strictly optional";<sup>10</sup> (3) "the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures" before turning to the Federal Rules; or (4) "the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the foreign state."<sup>11</sup> The Court unanimously rejected options (1) and (2) and, by a 5 to 4 margin, elected the fourth option

<sup>8</sup>*Societe Nationale Industrielle Aerospátiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>9</sup>*Societe Nationale Industrielle Aerospátiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 533, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>10</sup>*Societe Nationale Industrielle Aerospátiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 533, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>11</sup>*Societe Nationale Industrielle Aerospátiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 533, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).



over the third, holding that the convention is merely a "permissive supplement, not a preemptive replacement, for other means of obtaining evidence located abroad," but adding that considerations of international comity might require use of the convention procedures in certain instances.<sup>12</sup> The Court declined to "articulate specific rules to guide this delicate task of adjudication,"<sup>13</sup> but did indicate that lower courts should consider, among other factors, the "likelihood that resort to [the Hague] procedures will prove effective."<sup>14</sup> The Court intimated its own views on the effectiveness of the Convention as follows: "In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."<sup>15</sup> The Court added in a footnote that "in other instances a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pre-trial discovery."<sup>16</sup> Notwithstanding this nod to the Convention's utility in certain circumstances, George Bermann has observed that "the *Aerospatiale* majority has given the Convention a profile that is extremely unflattering and even caricatural."<sup>17</sup>

The majority's assessment of the Convention was evidently based in part upon an amicus brief submitted by the U.S. government recounting the experience of the Securities Exchange Commission (SEC) with the convention procedures in four instances.<sup>18</sup> The first involved a request to England for evidence from a hotel, a credit card company, and two individuals. The hotel and credit card company promptly produced the requested evidence, but the two individuals asserted a bank secrecy privilege. The claim of privilege

<sup>12</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>13</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 546, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>14</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>15</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 542, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>16</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 542 n.26, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>17</sup>George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aerospatiale Decision*, 63 Tul. L. Rev. 525, 543 (1989).

<sup>18</sup>Brief for the United States and the SEC as Amici Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (Aug. 22, 1986), 1986 WL 727504, at 15-18.

was not upheld, and the process of compelling testimony ultimately "yield[ed] useful evidence," but consumed nine months and substantial legal fees.<sup>19</sup> The SEC described a second case in which a request to a French court was granted only after two and a half years and, even then, the "witness refused to testify and the French court, in response, imposed a minor fine."<sup>20</sup> (As discussed below, the Solicitor General subsequently modified this account of the proceedings in France.) Another request was partially approved by an Italian court within two months of its issuance from the United States—the Italian witness was compelled to testify but, in accordance with Italy's Article 23 reservation, no documents were obtained.<sup>21</sup> Finally, a request for testimony and documents from a Guernsey bank was initially approved and then denied on the ground that it constituted "fishing." Eight months into the process, a Guernsey court dismissed the SEC's appeal as moot following the termination of the underlying U.S. proceeding.<sup>22</sup>

Writing on behalf of the four-Justice minority in *Aerospatiale*, Justice Blackmun urged a "general presumption that, in most cases, courts should resort first to the Convention procedures."<sup>23</sup> The dissent was based primarily upon respect for foreign judicial sovereignty interests. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, civil law jurisdictions consider the obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.<sup>24</sup> As a result, party-initiated discovery addressed directly to a foreign party may be viewed in civil law countries as an attempt to usurp a judicial function.<sup>25</sup> Justice Blackmun noted that "[u]se of the Convention advances the sovereign interests of

<sup>19</sup>Brief for the United States and the SEC as Amici Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (Aug. 22, 1986), 1986 WL 727504, at n.15.

<sup>20</sup>Brief for the United States and the SEC as Amici Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (Aug. 22, 1986), 1986 WL 727504, at n.16.

<sup>21</sup>Brief for the United States and the SEC as Amici Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (Aug. 22, 1986), 1986 WL 727504, 17.

<sup>22</sup>Brief for the United States and the SEC as Amici Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (Aug. 22, 1986), 1986 WL 727504, 17.

<sup>23</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 548–549, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>24</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 557, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>25</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 557–558, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R.



foreign nations because they have given *consent* to Convention procedures by ratifying them."<sup>26</sup>

The dissent also reflected an assessment of the convention as providing "effective discovery procedures that largely eliminate the conflicts between United States and foreign law on evidence gathering."<sup>27</sup> It questioned the majority's statement that the convention procedure would often be "unduly time consuming and expensive," observing that "until the Convention is used extensively enough for courts to develop experience with it, such statements can be nothing other than speculation."<sup>28</sup> In a footnote to this comment, Justice Blackmun addressed the SEC experience described in the United States' amicus brief, noting that the United States itself acknowledged that the experience of a government agency in the context of an enforcement action may be "atypical," and also citing a State Department finding that "private plaintiffs 'have found resort to the Convention more successful.'"<sup>29</sup> Blackmun then observed that the "SEC's attempts to use the Convention have raised questions of first impression, whose resolution in foreign courts had led to delays in particular litigation." Here, the dissent examined in further detail the French example cited by the SEC:

[T]he French Ministry of Justice approved expeditiously the SEC's letter of request for testimony of a nonparty witness. The witness then raised a collateral attack, arguing that the SEC's requests were administrative and therefore outside the scope of the Convention, which is limited by its terms to "civil or commercial matters." The Ministry of Justice ruled against the attack and, on review, the French Administrative Court ruled in favor of the French Government and the SEC. By then, however, the SEC was in the process of settling the

Serv. 3d 1105 (1987). Geoffrey Hazzard has described the situation more colorfully—"[p]ut bluntly, the impression of American discovery in most foreign countries is that of an alien legal regime conducting a warrantless search in someone else's domestic territory." Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1676 (1998).

<sup>26</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 560, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (emphasis in original).

<sup>27</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 548, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>28</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 561, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>29</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 562 n.20, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987), quoting Brief for the United States and the SEC as Amici Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.* (Aug. 22, 1986), 1986 WL 727504, at 18.

underlying litigation and did not seek further action on the letter of request.<sup>30</sup>

Justice Blackmun thus concluded that the French case presented novel jurisdictional issues that would not arise in the usual civil dispute. He indicated, moreover, that "unless the costs become prohibitive, saving time and money is not such a high priority in discovery that some additional burden cannot be tolerated in the interest of international goodwill."<sup>31</sup>

Justice Blackmun predicted that the majority's ad hoc comity approach "will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently."<sup>32</sup> From a broader perspective, he foresaw that disregard of the Convention would "likely carry a price tag of accumulating resentment, with the predictable long-term political costs that cooperation will be withheld in other matters."<sup>33</sup> Even so, he stressed that he was not proposing a "rigid *per se* rule that would require first use of the Convention without regard to strong indications that no evidence would be forthcoming."<sup>34</sup>

Much of the academic commentary on the *Aerospatiale* decision has been critical of the majority opinion.<sup>35</sup> In 1989, the Judicial Conference Advisory Committee on the Federal Rules of Civil Pro-

<sup>30</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 562 n.20, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987). These facts were derived from a letter to the Court from the Solicitor General amending the SEC's prior account of the proceedings.

<sup>31</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 562, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>32</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 548, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>33</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 567, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>34</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 566-567, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>35</sup>See, e.g., Louise Ellen Teitz, *Transnational Litigation* 189 (1996) (*Aerospatiale* has been severely criticized for a parochial approach that guts the Hague Evidence Convention, leading basically to a last resort standard); George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aerospatiale Decision*, 63 Tul. L. Rev. 525, 545 (1989) (the *Aerospatiale* decision "unfortunately misses an important opportunity to promote the spirit of accommodation essential to the internationalization of law and legal practice"); David J. Gerber, *International Discovery After Aerospatiale: The Quest for an Analytical Framework*, 82 Am. J. Int'l L. 521 (1988) (the failure of the *Aerospatiale* majority to provide any meaningful analytical framework "threatens to lead to conceptual chaos and may exacerbate rather than reduce current conflicts"); Hannah Buxbaum, *Assessing Sovereign Interests in Cross-Border Discovery Disputes*, 38



cedure proposed to revise Rule 26(2) to, in effect, adopt the presumptive first use rule urged by Justice Blackmun's in *Aerospátiale*.<sup>36</sup> The proposal was dropped following sharp criticism by the SEC and others.<sup>37</sup>

### C. Post-*Aerospátiale* case law

Justice Blackmun's prediction that the "somewhat unfamiliar procedures of the convention will be invoked infrequently"<sup>38</sup> has been borne out by subsequent case law. As noted by a Third Circuit judge, "[m]any times, rather than wade through the mine of a complex set of foreign statutes and case law, judges marginalize the Convention as an unnecessary 'option.'"<sup>39</sup> The *Aerospátiale* majority did not expressly address the issue of which party has the burden of persuasion under the comity analysis<sup>40</sup> but most lower courts have placed the burden on the party advocating use of the Convention<sup>41</sup> and, while giving a passing nod to notions of comity, almost invariably permit discovery under the Federal Rules of Civil

Tex. Int'l L.J. 87 (2003) (*Aerospátiale* "exacerbates conflicts of sovereign authority). But see James A.R. Nafziger, Another Look at the Hague Evidence Convention After *Aerospátiale*, 38 Tex. Int'l L.J. 103, 114 (2001) ("*Aerospátiale* has encouraged litigants to justify and seek to minimize, on one hand, the scope of discovery, and on the other, sovereign rights to block it. The end result has ensured greater access to information").

<sup>36</sup>Proposed Rules, 127 F.R.D. 237, 318 (1989). For an analysis of the proposal, see Gary B. Born, The Hague Evidence Convention Revisited: Reflections on its Rule in U.S. Civil Procedure, 57 Law & Contemp. Probs. 77, 90-92 (1994).

<sup>37</sup>See Gary B. Born, The Hague Evidence Convention Revisited: Reflections on its Rule in U.S. Civil Procedure, 57 Law & Contemp. Probs. 77, 92 (1994).

<sup>38</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 548, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>39</sup>*In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.2d 288, 306 (3d Cir. 2004) (Roth, J., concurring). There are exceptions to this observation, however. For instance, in *In re Vitamins Antitrust Litigation*, the court rejected first resort to the Convention procedures but only after having a special master sift through battling expert affidavits on the effectiveness of the Convention procedures in particular countries. *In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000).

<sup>40</sup>See *American Home Assurance Co. v. Societe Commerciale Toutelectric*, 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430, 447 (1st Dist. 2002), review denied, (Apr. 9, 2003) ("The *Aerospátiale* holding did not specify which party bears the burden of persuasion on whether considerations of comity favor application of the Hague Convention in a particular case").

<sup>41</sup>The lower courts have tended to interpret a statement by the *Aerospátiale* majority that a foreign litigant should not be denied "a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures in the first instance" as a suggestion that the burden rests with the party advocating the use of the convention. See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist.*

Procedure.<sup>42</sup> Indeed, most courts have declined to require use of the Convention procedures even for purposes of jurisdictional discovery.<sup>43</sup> At present, the Convention's primary function for American lawyers is obtaining evidence from non-party witnesses over whom the U.S. court does not have personal jurisdiction.<sup>44</sup>

Statistical data from foreign central authorities seem to bear out the limited role of the convention in U.S. litigation. The French central authority received only seven letters of request from the United States in 2002.<sup>45</sup> In the first 10 months of 2003, the English central authority received only 26 letters of request from the United States.<sup>46</sup> Other central authorities have reported receiving even fewer requests from American courts.<sup>47</sup>

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Court for Southern Dist. of Iowa, 482 U.S. 522, 547, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>42</sup>See, e.g., cases cited in Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on its Rule in U.S. Civil Procedure*, 57 *Law & Contemp. Probs.* 77, 86-87 (1994). Nevertheless, a few cases have required first resort to the convention. See, e.g., *Umana v. SCM*, 291 A.D.2d 446, 737 N.Y.S.2d 556 (2d Dep't 2002); *Husa v. Laboratoires Servier SA*, 326 N.J. Super. 150, 740 A.2d 1092 (App. Div. 1999); *Geo-Culture, Inc. v. Siam Inv. Management S.A.*, 147 Or. App. 536, 936 P.2d 1063 (1997); *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348 (D. Conn. 1991); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 9 Fed. R. Serv. 3d 301 (N.D. N.Y. 1987).

<sup>43</sup>See, e.g., *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 2004-1 Trade Cas. (CCH) ¶ 74294 (3d Cir. 2004); *In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000); *Fishel v. BASF Group*, 175 F.R.D. 525, 529 (S.D. Iowa 1997); *In re Bedford Computer Corp.*, 114 B.R. 2, 5-6 (Bankr. D. N.H. 1990); *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 260 (M.D. N.C. 1988). But see *Jenco v. Martech Intern., Inc.*, 1988 WL 54733 (E.D. La. 1988) (ordering first resort to the Hague Convention); *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 615 A.2d 297, 301 n.11 (Law Div. 1992) (same).

<sup>44</sup>See, e.g., *In re DaimlerChrysler AG Securities Litigation*, 216 F.R.D. 395 (E.D. Mich. 2003) (convention used in obtaining evidence from non-party German witnesses); *Tulip Computers Intern. B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469 (D. Del. 2003) (convention letter of request issued for depositions of former employees of Dutch plaintiff who were not subject to the jurisdiction of the U.S. court); *Motorola Credit Corp. v. Uzan*, 55 Fed. R. Serv. 3d 762 (S.D. N.Y. 2003).

<sup>45</sup>See, e.g., *Réponses françaises aux questions adressées par le Bureau Permanent de la Conférence concernant l'application de la Convention du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale* [Responses of France to the Questions Addressed by the Permanent Bureau of the Hague Conference concerning the Application of the Convention of March 18, 1970 on The Taking of Evidence Abroad in Civil or Commercial Matters].

<sup>46</sup>This figure was provided to the author by Mr. Erol Knight, Senior Policy Manager, Department for Constitutional Affairs, England.

<sup>47</sup>For instance, Finland had received only one letter of request from the United States between January 1, 2001 and September 15, 2003. See Response of Finland to the Questionnaire of the Hague Permanent Bureau (Oct. 2003).

In rejecting first use of convention procedures, U.S. courts routinely include unflattering assessments of their efficacy, such as the following: "this process is time consuming, and if the parties fail to cooperate, ineffective";<sup>48</sup> the Hague "procedure poses difficulties in obtaining adequate deposition testimony" and "is expensive and time consuming";<sup>49</sup> and "[w]e find use of the Convention Letters of Rogatory to be an unnecessary, complicated, time consuming, and expensive means of discovery, thus thwarting the interests of our court system."<sup>50</sup>

Yet these decisions rest upon a surprisingly thin empirical foundation. Justice Blackmun's critique of the *Aerospátiale* majority's assessment of the convention procedures as "nothing more than speculation" also applies to the post-*Aerospátiale* body of case law.<sup>51</sup> Seventeen years after *Aerospátiale*, judicial speculation concerning the ineffectiveness of the convention procedures "is widespread and self-reinforcing," as courts bolster a negative assessment of the Convention with "a citation or two to give them the requisite air of authority, but closer examination reveals that these citations prove very little."<sup>52</sup> One commentator traces one such string of citations as follows:

[T]he quote . . . comes from *Scarminach v. Goldwell GmbH*, citing to the earlier decision in *Haynes v. Kleinwefers*. The *Haynes* court stated that "[o]ne court has observed that the procedure of executing letters of request in Germany can be a very time-consuming and expensive effort." That statement would hardly justify drawing general conclusions about the Hague Convention's effectiveness, but we can let that pass for the moment as the defendant in *Scarminach* was a German corporation. What is more interesting is the decision cited by the *Haynes* court, *Murphy v. Reifenhauer, KG Maschinenfabrik*. The relevant passage is telling: "At least one previous letter of request executed in Germany required many months of effort involving translation of materials, transmittal through local counsel, review by the German Ministry of Justice and then by German courts, and other procedural maneuvering." Consequently, it becomes clear that what appears initially to be an assessment of Hague Convention procedures

<sup>48</sup>*Seguros Comercial Americas S.A. De C.V. v. American President Lines, Ltd.*, 933 F. Supp. 1301 (S.D. Tex. 1996).

<sup>49</sup>*Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139 (E.D. Tex. 1992).

<sup>50</sup>*In re Aircrash Disaster Near Roselawn, Ind.* Oct. 31, 1994, 172 F.R.D. 295, 310 (N.D. Ill. 1997).

<sup>51</sup>See Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aerospátiale Applications of the Hague Evidence Convention*, 24 *Int'l Law.* 393 (1990) (citing "the lower courts' nearly unanimous conclusion—apparently based on little more than surmise, and applied without regard to the specific type of discovery at issue—that the convention will be slow and inefficient").

<sup>52</sup>James Chalmers, *The Hague Evidence Convention and Discovery Inter-Partes: Trial Court Decisions Post-Aerospátiale*, 8 *Tul. J. Int'l & Comp. L.* 189, 200 (2000).



based on experience is simply a reference to the facts of one solitary case.<sup>53</sup>

Perhaps even more striking, the "one solitary case" upon which these citations are based does not necessarily support a negative assessment of the convention procedures. The case, a patent infringement/antitrust dispute between ITT and Corning Glass Works, constituted the very first instance in which an American party had ever attempted to use the convention letter of request procedures in Germany.<sup>54</sup> The American attorney who initiated the request assessed that pioneering endeavor as follows: "All things considered, the German depositions in the end worked out rather well" and "were well worth the effort."<sup>55</sup> This would hardly seem a strong foundation for a line of cases declaring the ineffectiveness of the Convention.

Likewise, in *Valois of Am., Inc. v. Risdon Corp.*, the district judge asserted that it is "generally recognized" that Hague Evidence Convention procedures "are far more cumbersome than under the Federal Rules of Civil Procedure."<sup>56</sup> In one of the cases cited in support of this claim, though, the court actually dismissed the plaintiffs' claim that Hague Evidence Convention procedures might prove "amazingly cumbersome and enervating" as "unsupported speculation."<sup>57</sup>

The ILC survey afforded an opportunity to move beyond speculation concerning the practical operation of the Hague Evidence Convention.<sup>58</sup> We will now turn to the survey and its findings.

<sup>53</sup>James Chalmers, *The Hague Evidence Convention and Discovery Inter-Partes: Trial Court Decisions Post-Aerospatiale*, 8 Tul. J. Int'l & Comp. L. 189, 200 (2000).

<sup>54</sup>For English translations of the German court decisions partially granting the letter of request, see Judgment of Nov. 27, 1980, Judgment of Oct. 31, 1980, Oberlandesgericht, 1981 JZ 538, reprinted in 20 I.L.M. 1025 (1981).

<sup>55</sup>Charles Platto, *Taking Evidence for Use in the United States—A Practical Guide*, 16 Int'l L.J. 575 (1982).

<sup>56</sup>*Valois of America, Inc. v. Risdon Corp.*, 183 F.R.D. 344 (D. Conn. 1997).

<sup>57</sup>*In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 355 (D. Conn. 1991).

<sup>58</sup>See Thomas E. Willging, *The Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 Notre Dame L. Rev. 1121, 1134 (2002) (stating, in connection with civil procedure reform, that "the method of choice in both experimental and observational studies is a written survey, using an instrument such as a questionnaire that is administered systematically to the research subjects, who may be judges, lawyers, litigants or other participants in the legal system).

### III. The ILC survey

The ILC survey form used a multiple-choice format with blanks provided for additional comments.<sup>59</sup> An overriding concern was that practicing lawyers would not take the time to complete the survey; thus, a premium was placed upon brevity and ease of completion.<sup>60</sup> The form was posted on the websites of the International and Litigation Sections of the ABA, and respondents were given the option of responding online or completing the form and returning it via regular or electronic mail. E-mails soliciting responses to the survey were sent to members of SIL's International Litigation and International Commercial Dispute Resolution Committees, the International Litigation Committee of the Litigation Section of the ABA,<sup>61</sup> and to American lawyers belonging to the International Litigation Committee (Committee "O") of the International Bar Association. The listservs of these various committees comprised over 1,500 names, although there was some overlap between their membership lists. The SIL International Litigation Committee also prepared a compendium of 116 reported cases decided after the U.S. Supreme Court's *Aerospatiale* decision that cite the Hague Evidence Convention.<sup>62</sup> A list of 203 attorneys who participated in those cases and their e-mail addresses was compiled from the compendium,<sup>63</sup> and e-mails were sent to each of them requesting that they participate in the survey.

There were 73 responses to the survey, including 41 from attorneys who had used the Hague Evidence Convention letter of

<sup>59</sup>The survey form was developed by the author, with substantial input from Robert F. Brodegaard (Thacher Profit & Wood LLP, New York). The following attorneys and ABA staff members also provided invaluable feedback: Donald J. Hayden (Baker & McKenzie, Miami), Barton Legum (Office of Legal Adviser of the U.S. Department of State), Thomas B. McNamara (Davis Graham & Stubbs, LLP, Denver), Rachel Pittman (SIL staff), Katherine Birmingham Wilmore (Debevoise & Plimpton, London), and several attorneys at Arnall Golden Gregory, LLP who pre-tested the questionnaire.

<sup>60</sup>Most online respondents devoted 10–15 minutes to completing the form. In placing a premium on brevity, the survey sacrificed obtaining some information that might have been useful. In hindsight, for instance, the survey might have included more focused questions on the expense of hiring foreign counsel, specific reasons why measures of compulsion did not result in the appearance of witnesses, and other matters. Even as it stood, however, some respondents did not entirely complete the form.

<sup>61</sup>Donald J. Hayden solicited responses from the International Litigation Committee of the ABA Litigation Section.

<sup>62</sup>The compendium is available on the SIL website at <http://www.abanet.org/intlaw/committees/disputes/litigation/links.shtml>. The compendium was prepared by Thomas B. McNamara, Glenn P. Hendrix and Martha Charepoo.

<sup>63</sup>An SIL intern, Arsineh Arakel, performed this task.

request procedures.<sup>64</sup> The ILC also received helpful feedback in the form of a detailed narrative from Legal Language Services, Inc. (LLS), which provides international litigation support services to law firms.

The relatively low number of responses was not unexpected. As previously noted, in the wake of *Aerospátiale*, the Hague Evidence Convention is seldom used by the American bar.<sup>65</sup> As one respondent to the ILC survey complained:

In my experience, trying to convince federal judges to honor this evidence treaty has been almost impossible. At most, the judges claim to narrow the scope of the requests, but at the end of the day, discovery proceeds as it would in the U.S.<sup>66</sup>

Although the respondents to the ILC survey were few in number, they seem to represent a fairly broad cross-section of the legal community. Respondents were allowed to answer anonymously, but most provided identifying information. Many of the larger multinational firms were represented among the respondents, together with several regional firms, and numerous small firm lawyers. Fourteen states and the District of Columbia are represented among the respondents who identified themselves on the survey form. Not surprisingly, New York was the best represented state. Eight of the 29 respondents who had used the Hague Evidence Convention and who identified themselves on the survey form were from New York. No other state was represented by more than two respondents.

The survey respondents indicated having used the Hague Evidence Convention in 20 of the 42 contracting states to the Convention. The United Kingdom was listed as the most common destination for letters of request from the United States—21 of 41 respondents who answered this question indicated that they had used the convention procedures in that country. The United Kingdom was followed by France (19); Germany (17); Switzerland (9); Hong Kong (7); Italy (4); Argentina, Mexico, the Netherlands, and Spain (3 each); China, Denmark, Israel, Singapore, and South Africa (2 each); and Australia, Barbados, Kuwait, Turkey, and Venezuela (1 each).

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<sup>64</sup>Many respondents did not answer each and every question, however, and, as a result, there are fewer than 41 responses to most of the questions.

<sup>65</sup>See Patrick J. Borchers, The Incredible Shrinking Hague Evidence Convention, 38 Tex. Int'l L.J. 73, 85 (2003) (*Aerospátiale* has resulted in "an Evidence Convention that—measured by its practical impact on U.S. litigation—has shrunk considerably").

<sup>66</sup>This respondent added that "the biggest problem I face is in arguing that the *Aerospátiale* case does not apply to discovery on the threshold issue of personal jurisdiction. In that case, there was an earlier finding that the court had personal jurisdiction. It defies both logic and fairness to require a foreign litigant to submit to the Federal Rules of Civil Procedure in connection with a motion challenging the power of the U.S. court to make any decisions concerning that defendant."



After asking respondents to indicate all countries with which they had convention experience, the questionnaire included the following instruction: "[I]f you have participated in Convention discovery of evidence from more than one country, we ask that you choose *only one* such country and answer the following questions as to *only that country*. Please select the country with respect to which you believe your experience would be most helpful to the Hague Conference. Obviously, we would be delighted if you would complete separate questionnaires as to each country for which you have Convention experience, and we encourage you to do so." The purpose of this instruction was to ensure that the responses could be related back to experience in a particular country. The countries "selected" by the respondents, and with respect to which they completed the questionnaire, included: France (12 respondents), the United Kingdom (10), Switzerland (7), Germany (5), Australia (2), Hong Kong (2), Italy (2), the Netherlands (2), Argentina (1), Barbados (1), Singapore (1), and Venezuela (1).

Twenty-five of 41 respondents (61%) had experience with more than one country, as reflected in the following breakdown:

| <u>Number of Countries<br/>in Which Respondent Used<br/>Convention Procedures</u> | <u>Number of Re-<br/>spondents</u> |
|-----------------------------------------------------------------------------------|------------------------------------|
| 6                                                                                 | 3                                  |
| 5                                                                                 | 3                                  |
| 4                                                                                 | 6                                  |
| 3                                                                                 | 4                                  |
| 2                                                                                 | 9                                  |
| 1                                                                                 | 16                                 |

Despite being requested to fill out additional forms for each country with which they had convention experience, virtually all of the respondents completed only one form for only one country. This may have introduced an element of bias into the results. Assuming that respondents followed the instruction to complete the form as to the country with respect to which their "experience would be most helpful," most presumably tended to select a country with which they had encountered problems.

#### IV. The survey findings

The survey generated a number of findings that provide useful information in considering the Hague Evidence Convention.

##### A. Overall assessments of the effectiveness of the Hague Evidence Convention letter of request procedure

A number of respondents—17 of 28—indicated that their experi-

ence with the Hague Evidence Convention was "less satisfactory" than they had anticipated. They were responding as to France (7 respondents), the United Kingdom (4), Switzerland (2), Barbados (1), Germany (1), the Netherlands (1), and Venezuela (1). One of these respondents (an experienced litigator who had used the Hague Evidence Convention procedure in Australia, France, Germany, Spain, and Switzerland) added the following remark: "It is cumbersome and expensive, and is to be used only as a last resort."

On the other hand, 11 respondents answered that their experience was "more satisfactory" than anticipated. They were describing their experiences in the United Kingdom (4 respondents), Germany (3), Switzerland (2), Hong Kong, and the Netherlands.<sup>67</sup> Some of these respondents inserted such comments as, "works fine in the Netherlands," and "I did not find the procedure difficult to use" in the United Kingdom.

Most respondents (25 of 34, or 74%) indicated that they were "glad" they had used the Convention and would again "initiate use of the Convention procedures under the same circumstances."<sup>68</sup> These respondents were describing their experiences in the United Kingdom (5 respondents), France (5), Germany (3), Switzerland (3), Italy (2), the Netherlands (2), Argentina (1), Barbados (1), Hong Kong (1), Singapore (1) and Venezuela (1). The 9 respondents (26%) who indicated that they were not "glad" that they had used the Convention and would not initiate the convention procedures again under similar circumstances were answering as to their experiences in the United Kingdom and France (3 respondents each), Switzerland (2), and Germany (1). That the United Kingdom, France, Switzerland and Germany were cited by respondents in connection with both positive and negative assessments of the convention demonstrates the dangers of over-generalizing the experiences of any one litigant.

Although most respondents indicated that they were glad they had used the convention procedures and would initiate them again under the same circumstances, this does not mean that they considered Hague Evidence Convention discovery procedures to be as effective as Federal Rules of Evidence discovery procedures. As previously noted, letters of request are used almost exclusively for evidence gathering from non-party witnesses from whom Federal Rules of Evidence discovery is not possible. A U.S. attorney might be glad that the Hague Evidence Convention was available to obtain

<sup>67</sup>These figures exclude respondents who skipped this question, as well as 9 respondents who answered, "I don't know." If the respondents who answered, "I don't know," are included, the data break down as follows: "less satisfactory"—46%; "more satisfactory"—30%; "I don't know"—24%.

<sup>68</sup>This percentage does not take into account three respondents who answered, "I don't know."



evidence from such witnesses and may have found the endeavor to be useful, but would not necessarily wish to use the convention procedure in other circumstances. One of the survey respondents (who had used the convention procedure several times in France) made this distinction explicit. While checking the box that he was not “glad” that he had used the convention procedures, he qualified that answer with the following comment: “Yes—if it’s the only way to get the discovery, but not if it is forced upon me by the court.”

While not reflecting the effectiveness of the convention procedures relative to Federal Rules of Evidence discovery procedures, the responses to this question do suggest that the Convention is generally effective in an absolute sense—parties usually succeed in obtaining evidence. Indeed, 18 of 31 respondents (58%) indicated that testimony obtained through the Convention had an impact on the ultimate disposition or settlement posture of the case, while only 5 respondents (16%) indicated that it had no impact; 8 (26%) indicated that they did not know.<sup>69</sup>

Unfortunately, the survey did not inquire as to the types of cases in which respondents had used the convention procedures. A few respondents with negative assessments of the convention procedures volunteered that they were involved in antitrust or Holocaust-related litigation, which some foreign states have resisted as extra-territorial exercises of U.S. jurisdiction.<sup>70</sup> It would have been interesting to compare the experience of convention users in these types of cases with those who have used the Convention in more routine civil litigation.

## **B. Time frames for execution of letters of request**

One of the most consistent criticisms of the Hague Evidence Convention letter of request procedures is that they are “time-consuming.” That criticism is borne out to some extent by the survey results. Asked whether they had ever considered using the letter of request procedures but elected not to, 53% of the survey respondents

<sup>69</sup>Further, only 3 respondents indicated having an evidentiary objection upheld in the United States with regard to testimony obtained through the Convention.

<sup>70</sup>See, e.g., David S. Pennock, U.S. Procedures for Obtaining Evidence Abroad for Use in Proceedings in the United States, in *Antitrust Trial Practice Handbook Series Volume 1: Obtaining Discovery Abroad*, 3 (John F. McClatchey et al. eds., 1990) (“The frictions caused by efforts to apply U.S. discovery procedures to foreign parties and witnesses are greatest where, as in antitrust actions, the foreign state views with alarm the enforcement of the substantive law.”); Ugo Mattei & Jeffrey Lena, U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications, 24 *Hastings Int’l & Comp. L. Rev.* 381, 388 (2001) (stating, in connection with the Holocaust-related litigation, that the “very activist jurisdictional posture of U.S. courts . . . is now resented as a major phenomenon of legal imperialism”).



cited "concerns over delays" as a reason.<sup>71</sup> Also, precisely half of the respondents (19 of 38) indicated that use of the convention letter of request procedure "delay[ed] case management or trial of the domestic litigation." Of course, not all of the delays occur abroad. There is some delay even prior to the issuance of the letter of request. For instance, documents must often be translated into a foreign language, and the motion for issuance of the letter of request may be contested, sometimes resulting in extensive briefing and hearings.<sup>72</sup>

Once the letter of request has been transmitted abroad, the average time frame for its execution does not seem particularly excessive.<sup>73</sup> With regard to oral testimony, 21 of 33 respondents indicated that the average length of time from issuance of a letter of request until receipt of the evidence or a final determination was less than four months and only 5 of 33 indicated a period of more than six months, as reflected in the following chart:

|                 | Response<br>Percent | Response<br>Total |
|-----------------|---------------------|-------------------|
| 1 month or less | 0%                  | 0                 |
| 1-2 months      | 12.1%               | 4                 |

<sup>71</sup>One of the survey questions asked respondents whether they had ever considered using the convention letter of request procedures in a particular case and then elected not to. If so, they were asked to give a reason. The answers of respondents who had previously used the Convention were tracked separately from those given by respondents with no prior convention experience. The leading reason cited by respondents with convention experience for having foregone use of a convention letter of request in particular cases was concerns over delays (53%), followed by inability to conduct an American-style witness examination (40%), inability to identify documents with the requisite specificity (33%), expense to the client (33%), concerns regarding the assertion of foreign evidentiary privileges (30%), and the witness' subsequent agreement to a consensual deposition (6.6%). Respondents with no convention experience cited the following reasons for not having used a letter of request in particular cases—concerns over delays (64.3%), expense to the client (50%), inability to conduct an American-style witness examination (42.9%), insufficient familiarity with the convention procedure (28.6%), concerns regarding the assertion of foreign evidentiary privileges (21.4%), and the witness' subsequent agreement to a consensual deposition (14.3%).

<sup>72</sup>See, e.g., *Abbott Laboratories v. Impax Laboratories, Inc.*, 2004 WL 1622223 (D. Del. 2004); *Tulip Computers Intern. B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 474 (D. Del. 2003).

<sup>73</sup>Of course, whether a particular execution period is deemed expeditious lies to some extent in the eyes of the beholder. In *Benton Graphics v. Uddeholm Corp.*, the Swedish government provided a letter estimating that, based on "past history," a letter of request would be executed in "approximately two months." The court nevertheless declined resort to the Hague procedure on the ground that "[t]his case has already endured numerous delays and discovery should proceed apace." *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391, 10 Fed. R. Serv. 3d 114 (D.N.J. 1987).

|                                                            | <b>Response<br/>Percent</b> | <b>Response<br/>Total</b> |
|------------------------------------------------------------|-----------------------------|---------------------------|
| 2-4 months                                                 | 51.5%                       | 17                        |
| 4-6 months                                                 | 21.2%                       | 7                         |
| 6-9 months                                                 | 6.1%                        | 2                         |
| 9-12 months                                                | 0%                          | 0                         |
| 12-18 months <sup>74</sup>                                 | 6.1%                        | 2                         |
| more than 18 months                                        | 0%                          | 0                         |
| N/A (never received the evidence or a final determination) | 3.0%                        | 1                         |

With respect to document requests, the execution periods were slightly longer. Even so, almost half of the respondents (13 of 27) indicated an execution period of under four months, and 22 of 27 indicated an execution period of six months or less:

|                                                            | <b>Response<br/>Percent</b> | <b>Response<br/>Total</b> |
|------------------------------------------------------------|-----------------------------|---------------------------|
| 1 month or less                                            | 0%                          | 0                         |
| 1-2 months                                                 | 11.1%                       | 3                         |
| 2-4 months                                                 | 37%                         | 10                        |
| 4-6 months                                                 | 33.3%                       | 9                         |
| 6-9 months                                                 | 3.7%                        | 1                         |
| 9-12 months                                                | 0%                          | 0                         |
| 12-18 months <sup>75</sup>                                 | 3.7%                        | 1                         |
| more than 18 months                                        | 0%                          | 0                         |
| N/A (never received the evidence or a final determination) | 11.1%                       | 3                         |

These results are generally consistent with other available data. A 1985 Special Commission of the Hague Conference reported that the average length of time to execute a letter of request was between one and six months.<sup>76</sup> In response to a questionnaire distributed by the Hague Conference prior to the 2003 Special Commission, the central authorities for various convention signatories indicated the following average time frames for execution of letters of request:

<sup>74</sup>The answers of 12-18 months pertained to letters of request directed to Switzerland and France.

<sup>75</sup>The answers of 12-18 months pertained to France.

<sup>76</sup>Hague Conference on Private International Law, Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 I.L.M. 1668, 1674 (1985).

|                |                                        |
|----------------|----------------------------------------|
| Denmark        | "5 months"                             |
| Finland        | "1-2 months"                           |
| France         | approximately six months               |
| Germany        | "four months, plus mail delivery time" |
| Norway         | "1-3 months"                           |
| Poland         | "2-4 months"                           |
| Switzerland    | "one to three months"                  |
| United Kingdom | "110 days" <sup>77</sup>               |

Similarly, an international litigation logistics support firm, Legal Language Services, Inc., reports that it "is generally able to secure a place on the foreign docket within 4 to 6 weeks of the date the request was filed and a hearing [i.e., deposition] date approximately 2 to 3 months from that date."<sup>78</sup>

There are, of course, exceptions.<sup>79</sup> Two respondents indicated response times of 12-18 months with respect to requests for oral testimony directed to France and Switzerland, respectively. One respondent indicated the same period for a document request directed to France. Similar problems are noted in the case law. In one reported case involving a letter of request issued to France, the court noted that a party had already spent "nearly two years . . . attempting to take the testimony of the French Witnesses through coercive means."<sup>80</sup>

<sup>77</sup>Hague Conference on Private International Law, Synopsis of the Replies to the Questionnaire Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil Matters (Prel. Doc. No. 4), 11-12 (Oct. 2003). A few central authorities, including the French, German, and Swiss, noted that certain procedures, such as obtaining opinions from experts, require more time.

<sup>78</sup>Cara LaForge, Lessons from the Trenches: Practical Tips on Taking Compulsory Evidence Abroad, ABA Teleconference Seminar on International Evidence Taking and Service of Process After the 2003 Hague Special Commission (Mar. 23, 2004). LaForge also notes, however, that postponements requested by the witness may result in further delays.

<sup>79</sup>See Judith L. Holdsworth et al., Germany, in *Transnational Litigation—A Practitioner's Guide*, at GER-56 (Richard H. Kreindler et al. eds., 1997) (noting that in Germany, the "time frame for the execution of requests can vary from a few weeks to over two years").

<sup>80</sup>*Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 246 F. Supp. 2d 285, 289 (S.D. N.Y. 2003); see also *Dietrich v. Bauer*, 2000 WL 1171132 (S.D. N.Y. 2000), on reconsideration in part, 198 F.R.D. 397 (S.D. N.Y. 2001) (party abandoned effort to obtain documents through the Hague procedure from bank in the Channel Islands due to delays).



Some such delays occur when litigation over the letter of request ensues in the foreign court.<sup>81</sup> In one recent case, for example, a California court issued a letter of request seeking documents from a French witness on March 26, 2002. A Paris court issued an order of compulsion six weeks later, on May 7, 2002. The witness challenged the order on various grounds, including allegations that the request was unduly broad under France's Article 23 reservation, that the documents were being sought for use in a parallel criminal investigation, and that production would breach his privilege against self-incrimination. Production was ultimately required by an appellate court ruling on September 18, 2003, and the proponent of the request was awarded 15,000 Euros in legal costs, but the process took 18 months.<sup>82</sup>

Likewise, in a recent English case, the U.S. district court issued a letter of request on July 19, 2002 seeking depositions of three witnesses.<sup>83</sup> Within a week, on July 25, a Master of the English court (roughly equivalent to a U.S. magistrate) issued an order for the examinations. The witnesses moved to set the order aside on August 25, and a three-day hearing ensued. The order was upheld, subject to certain conditions relating to the scope and conduct of the depositions. The proponent of the request was also awarded 80% of its legal costs. At this point, things slowed down, as the witnesses' next appeal, to the High Court, was not decided (and rejected) until April 9, 2004, almost nine months after the letter of request was issued. Further challenges would have consumed additional time, although appeals involving letters of requests from the United States have been known to travel all the way through the system—from the High Court, to the Court of Appeal, and through the House of Lords—within a year.<sup>84</sup>

Recalcitrant witnesses are clearly able to delay the taking of evidence through legal challenges, although a "loser pays" regime may

<sup>81</sup>See Ministry of Justice of the Netherlands, Answers to the Hague Conference Questionnaire Relating to the Hague Evidence Convention (Netherlands) (Oct. 2003) ("An impeding factor . . . is created by the many formal hurdles which may often result in a refusal of the requested court after opposition of the witness is heard."); Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aerospatiale Applications of the Hague Evidence Convention*, 24 *Int'l Law.* 393 (1990), at 398 n.24 ("Assuming that no foreign litigation ensues, letters of request are ordinarily executed in three to six months.").

<sup>82</sup>CA Paris, 1e ch., Sept. 18, 2003, *Marc Ladreit de LeCharriéré v. Cal. Comm'r of Ins.*, Case No. 2002/18509.

<sup>83</sup>*Miller v. Endo Pharmaceuticals Inc.*, [2003] E.W.H.C. 3122, 2003 WL 23014848 (Ch D 2003).

<sup>84</sup>See *Sedgwick Group Plc v. Johns-Manville Fibreboard Corp.*, [1985] 1 W.L.R. 331, 1985 WL 311458 (HL 1985) (*In re Asbestos Insurance Coverage Cases*) (letter of request issued on April 24, 1984, and House of Lords decision rendered on February 28, 1985).

discourage such maneuvering. Even without appeals, the Hague Evidence Convention procedure will generally be slower than domestic discovery, which is to be expected given the injection of a foreign state into the proceedings. Nevertheless, the survey results suggest that in the usual case, delays are not particularly excessive. Indeed, the turnaround can be remarkably quick. In one reported case, a letter of request issued from a U.S. court on September 8, and the English court issued a deposition summons just seven days later, on September 15.<sup>85</sup>

### C. Methods and procedures for taking testimony

Methods and procedures for examining witnesses in civil law countries differ significantly from those in the United States. In many jurisdictions, the witness, who is not sworn, initially gives an uninterrupted narrative of his version of the facts; thereafter the judge acts as examiner-in-chief, with counsel asking only follow-up questions, subject to leave of the court, and without using leading questions. In certain civil law countries, the attorney is unable to even pose follow-up questions directly to the witness but, rather, provides them to the court, which then presents them to the witness. In lieu of a verbatim transcript, the judge pauses from time to time to dictate a summary of the testimony for the file. The summary is read back to the parties and the witness for their approval and suggestions on how the wording might be improved. As noted by one practitioner, "[n]eedless to say, hesitation, other signs that the witness is lying, and even most corrections are not recorded."<sup>86</sup> A firm that arranges court reporters for foreign depositions has observed that testimony that might result in 300–400 pages of verbatim transcript may generate only 10 pages of court summary.<sup>87</sup>

Article 9 of the Hague Evidence Convention seeks to smooth out differences between legal systems to some extent, providing that a judicial authority shall apply the local methods and procedures in executing a letter of request but "will follow a request of the request-

<sup>85</sup>LNP Engineering Plastics, Inc. v. Miller Waste Mills, Inc., 77 F. Supp. 2d 514 (D. Del. 1999), aff'd in part, rev'd in part, 275 F.3d 1347, 61 U.S.P.Q.2d (BNA) 1193 (Fed. Cir. 2001). See Steven Loble, Obtaining Evidence in England for use in Proceedings in the U.S.A., available at <http://www.loble.co.uk/obtaining-evidence.htm> (statement by English solicitor who handles discovery requests on behalf of the U.S. government that orders on a letter of request "can . . . be obtained within a week").

<sup>86</sup>Paul Storm, The Netherlands, in Obtaining Evidence in Another Jurisdiction in Business Disputes 112 (Charles Platto & Michael Lee eds., 2d ed. 1993).

<sup>87</sup>Cara LaForge, Lessons from the Trenches: Practical Tips on Taking Compulsory Evidence Abroad, ABA Teleconference Seminar on International Evidence Taking and Service of Process After the 2003 Hague Special Commission (Mar. 23, 2004).

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ing authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedures or by reason of practical difficulties." Philip Amram, the Rapporteur of the proceedings that resulted in the Convention, described the intent of Article 9 as follows:

To be "incompatible" with the internal law of the State of execution does not mean "different" from the internal law. It means that there must be some constitutional inhibition or some absolute statutory prohibition. No Civil Law delegation suggested that his country had constitutional or statutory provisions which would prevent the examination of witnesses and the preparation of the transcript of the testimony "Common Law style."

There is a clear difference between "impracticable" and "impossible of performance." The latter is a much heavier burden to assume. This was deliberate. The basic intent is to maximize international cooperation and to minimize the possibilities of refusal to cooperate. It is not sufficient for the foreign practice to be "difficult" to administer or "inconvenient"; compliance must be truly "impossible."<sup>88</sup>

Several countries have taken significant measures to implement Article 9. For instance, France amended its Civil Procedure Code (Nouveau Code de Procédure Civile) to allow common law procedures to be used in witness examinations conducted pursuant to the Convention, including verbatim transcripts.<sup>89</sup>

Although the Convention permits counsel for the requesting party to attend the examination, they are not required to do so, in which case the foreign judge examines the witness.<sup>90</sup> The requesting party may either provide the foreign judicial authority with "the questions to be put to the persons to be examined or a statement of a subject-matter about which they are to be examined."<sup>91</sup> The latter option allows for greater spontaneity but also presupposes a foreign judge who is willing and capable of becoming familiar with the facts of the case. One survey respondent who chose not to attend a witness examination but, rather, sent the letter of request to Switzerland with written questions to be asked by the Swiss judge,

<sup>88</sup>Philip Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. A, p.11, 92d Cong., 2d Sess. 11 (1972), reprinted in 12 I.L.M. 327 (1973).

<sup>89</sup>See Arts. 736 to 748, N.C.P.C. Nevertheless, one French lawyer observes that although "in theory the door is open to a cross examination before the French court, . . . there is little chance of the court agreeing to this, especially as its inexperience of this system will hardly encourage the lawyers acting for the parties to insist on this being done in accordance with common law practice." Jean-Louis Delvolvé, France, in *Obtaining Evidence in Another Jurisdiction in Business Disputes* 86 (Charles Platto & Michael Lee eds., 2d ed. 1993).

<sup>90</sup>See Hague Evidence Convention, art. 7.

<sup>91</sup>Hague Evidence Convention, art. 3(f).



complained that the "answers were incomplete or evasive. Answers could not be followed up."

Twenty-eight respondents to the ILC survey indicated that they had attended the witness examination. Four of these respondents—who were answering with regard to Switzerland (2), France (1), and Germany (1)—stated that questioning was conducted exclusively by the judge. One of these respondents added that in Germany he was "unable to cross-examine and critical questions suggested to the court to ask the witness were rejected without explanation." Another respondent, answering as to France, added a similar comment—"No follow up questions."

Three respondents described a mixed procedure, with the examination conducted by both the judge and counsel:

- one respondent, commenting as to his experience in Switzerland, indicated that the examination was conducted by the "foreign judicial authority [with] follow up by me as long as on topic of written question."
- another respondent, who was also discussing Switzerland, stated: "The judicial authority started by the written questions attached to our letter request. Once that process was completed, counsel were allowed to ask follow up questions but only to the extent they fell under the scope of the written questions."
- a third respondent, commenting as to multiple experiences with the convention procedure in Germany, indicated that the examination was conducted in accordance with "each of the first three choices above [i.e., by American counsel, foreign counsel, and the foreign judicial authority], but primarily [by] the foreign judge."

The remaining 21 respondents directly examined the witness, with 18 indicating that they were permitted to conduct an "American-style" witness examination. Not surprisingly, many of them were describing their experiences in common law jurisdictions—the United Kingdom (7), Hong Kong (1), and Barbados (1). Yet, several were also able to conduct American-style examinations in civil law countries—France (2), Germany (2), Switzerland (2), Italy (1), Netherlands (1), and Venezuela (1).

The three respondents who were not able to conduct an American-style examination were describing their experiences in Switzerland (1) and France (2). Their comments were as follows:

"The court insisted on the witness and all lawyers speaking in French, although the witness and both sides' lawyers were native English

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speakers. Thus, all questions had to be translated from English to French, and then all answers from French to English.” (France)<sup>92</sup>

“Translation process slow and burdensome.” (France)

“Lack of clarity in answers.” (Switzerland)

Despite the dissatisfaction of some respondents with witness examination procedures in France, Switzerland, and Germany, other respondents indicated being satisfied with the examination procedures in those countries. This seems to bear out an observation by Legal Language Services, Inc. that “the personality and experience of the presiding judge is an important factor in determining the degree to which U.S. counsel will be accommodated.”<sup>93</sup>

Twenty-three of 31 respondents (74%) indicated that a verbatim transcript was taken.<sup>94</sup> In each of the eight instances in which no verbatim transcript was taken, the record of the testimony was deemed by the survey respondent to be “substantially accurate.”<sup>95</sup> One respondent, while indicating that the summary was substantially accurate, did complain that the lack of a verbatim transcript “diminish[ed] its value in an American court.” A second respondent also deemed the transcript substantially accurate, but observed

<sup>92</sup>Under the French procedure, the attorney’s questions and the answers of the witness must be translated into French, even if the witness is a native English speaker. See Art. 740, N.C.P.C.

<sup>93</sup>Cara LaForge, *Lessons from the Trenches: Practical Tips on Taking Compulsory Evidence Abroad*, ABA Teleconference Seminar on International Evidence Taking and Service of Process After the 2003 Hague Special Commission (Mar. 23, 2004); see also Judith L. Holdsworth et al., *Germany*, in *Transnational Litigation—A Practitioner’s Guide*, at GER-56 (Richard H. Kreindler et al. eds., 1997), at GER-560 (“The extent to which a German judge will permit deviation from German procedures in executing a Letter of Request for testimony from a German national depends on the directives he has received from the Central Authority, the individual judge’s preferences, and the facts and circumstances of the case.”); *In re Vitamin Antitrust Litigation*, 2001 U.S. Dist. LEXIS 25070 (D.D.C. Sept. 10, 2001) (special master’s report) (citing French legal expert for the proposition that “[w]hile depositions where counsel may ask questions can be taken, cross-examination is up to the French judge”); Hague Conference on Private International Law, *Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 24 I.L.M. 1668, 1674 (1985), at § 3.B. (“it appeared that the courts in civil law countries generally will allow for depositions to be taken ‘common law’ style if so requested, even though they may sometimes have difficulties conducting a cross-examination”).

<sup>94</sup>This figure includes respondents who did not attend the witness examination.

<sup>95</sup>Note that pursuant to Fed. R. Civ. P. 28(b), “[e]vidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.”

that a "summary of a judicial officer's findings is not equivalent to the give and take from a Q&A format."<sup>96</sup>

Three respondents reported that they were unable to take video depositions in France:

No ability to compel videotaped deposition for use at trial.

[T]he inability to videotape the depositions diminished their effectiveness and usefulness in an American court.

One French judge refused to allow videotaping even though French procedure now allows for videotaping (as our local counsel pointed out to the court), but the court ruled that French 'practice' was opposed to videotaping. The US should request that the French Ministry of Justice instruct judges not to oppose reasonable discovery requests for purely subjective reasons.

One respondent also provided a copy of a 2003 decision from a Paris court authorizing a deposition to proceed but barring videotaping.<sup>97</sup>

The assertion of foreign evidentiary privileges is sometimes cited as a bar to effective use of the Hague Evidence Convention. Article 11 of the Convention entitles witnesses to assert privileges available under the laws of both the requesting state and the state of execution of the request. Professional and trade secret privileges tend to be broader in continental Europe than in Anglo-American civil procedure.<sup>98</sup> Seven survey respondents reported the assertion of a foreign privilege "that would not likely have been recognized by the U.S. court." Their answers pertained to Barbados (1), France (2), Germany (1), Switzerland (1), the United Kingdom (1), and Venezuela (1).

#### D. Requests for documents

Article 23 of the Hague Evidence Convention provides:

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

<sup>96</sup>It should be noted that the respondent who made this comment also indicated that he did not attend the witness examination; the foreign judicial authority (a French judge) asked the questions.

<sup>97</sup>T.G.I. Paris, Mar. 4, 2003, In the matter of Letters Rogatory from the U.S., Manhattan Invest. Fund Ltd. v. Bear Stearns Securities Corp. For a discussion of this case, see Nathalie Meyer-Fabre, *L'Obtention des Preuves a L'Etranger* [Obtaining Evidence from Abroad], *Travaux Du Comité Française De Droit International Prive*—2002–2004 [Works Of The French Committee On Private International Law—2002–2004] (Ed. Pedone, forthcoming 2005).

<sup>98</sup>See, e.g., *Jacobson v. Deutsche Bank, A.G.*, 206 F. Supp. 2d 590, 592, 59 Fed. R. Evid. Serv. 360 (S.D. N.Y. 2002), judgment aff'd, 59 Fed. Appx. 430 (2d Cir. 2003) (German journalist deposed pursuant to Hague Convention refused to answer questions based on journalist's privilege recognized under German law); see also Rolf Stürner, *Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT*, 34 Int'l Law. 1071, 1081 (2000).

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As previously indicated, most contracting states to the Convention have entered some form of Article 23 reservation. At this writing, the exceptions include Barbados, Belarus, the Czech Republic, Israel, Latvia, the Russian Federation, the Slovak Republic, Slovenia, and the United States. The Article 23 reservations of some countries preclude document discovery altogether, including Argentina, Australia, Bulgaria, Denmark, Hungary, Italy, Kuwait, Luxembourg, Monaco, Poland, Portugal, Seychelles, South Africa, Spain, Sri Lanka, Sweden, Turkey, and Ukraine. Others have entered "limited" reservations which permit the production of documents that are identified with a high degree of particularity. These include China, Cyprus, Estonia, Finland, France, Mexico, the Netherlands, Norway, Romania, Singapore, Switzerland, the United Kingdom, and Venezuela. In certain jurisdictions such as Germany and the Netherlands, the impact of an Article 23 reservation may be mitigated to some extent by conducting an oral deposition regarding the contents of documents.<sup>99</sup>

Even in countries that have entered only "limited" Article 23 reservations, execution of the typical American-style document request (produce any and all documents that relate or refer to . . . ) is not contemplated. The experience of U.S. litigants with letters of request to England is instructive in that regard. English courts distinguish between "evidence in the nature of proof to be used for the purposes of the trial and evidence in the nature of pretrial discovery to be used for purposes of leading to a train of inquiry which might produce direct evidence for trial."<sup>100</sup> In addition, a person cannot be directed to "produce any documents other than particular documents specified . . . as being documents appearing . . . to be, or likely to be, in his possession, custody or power";<sup>101</sup> thus, "conjectural documents" which may or may not exist do not satisfy the test. For instance, a request for a person's "monthly bank statements for the year 1984 relating to his account" with a named bank would pass muster if there was evidence to show that the person had a current account at that bank and that the bank regularly sent monthly statements to its customers. On the other

<sup>99</sup>See Hague Conference on Private International Law, Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 I.L.M. 1668, 1674 (1985), I.1.C.; Judith L. Holdsworth et al., Germany, in *Transnational Litigation—A Practitioner's Guide*, at GER-56 (Richard H. Kreindler et al. eds., 1997), Ger-54; David McClean, *International Co-Operation in Civil and Criminal Matters* (2002), 118 n.76. English law prohibits this approach, however. Pursuant to the Evidence (Proceedings in Other Jurisdictions) Act, 1975 c 34, § 2(4), a person cannot be required "to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power."

<sup>100</sup>Rules of Supreme Court (RSC) Ord. 70, r.1 to 6 n.5.

<sup>101</sup>Evidence (Proceedings in Other Jurisdictions) Act, 1975 c 34, § 2(4).

hand, a general request for "all the respondent's bank statements for 1984" would fail.<sup>102</sup> In one case, production was ordered of "a letter believed to have been mailed by Boeing to British Airways on or about March 31, 1983, enclosing a proposed amendment to the Spare Parts General Terms Agreement between Boeing and British Airways."<sup>103</sup> In a different case, however, the English court denied a request for "any" written instructions from the plaintiffs to their agents to obtain certain specified insurance policies, even though the proponent produced affidavits demonstrating that the plaintiffs must have given instructions in order for the insurance policies to have been issued in the first place. In denying the request, the judge observed that the "reference to 'any' documents . . . suggests to me that the draftsman did not know whether such documents were in existence or not," and that "it is possible that instructions for some policies may have been given verbally and that there were no written instructions for those policies."<sup>104</sup>

Notwithstanding the constraints imposed by Article 23 reservations, one practitioner notes:

Contrary to misconceptions surrounding Article 23, carefully drafted, specific document requests will, in the case of many contracting states stand a good chance of execution. Such a request should point out how the documents requested are specifically relevant to a matter that will be an issue at trial. In sum, Article 23 reservations by signatory nations do not, on the whole, constitute a complete ban on the pretrial discovery of documentary evidence.<sup>105</sup>

The survey results generally support that view, at least with regard to limited Article 23 reservations. Fourteen of the survey respondents indicated that they received all of the documents sought in a letter of request. The countries from which the documents were obtained were the United Kingdom (4), France (3), Switzerland (2), Italy (2), the Netherlands (1), and Argentina (1).<sup>106</sup> On the other hand, 10 other respondents indicated that the foreign judicial authority refused to compel production of any documents. The

<sup>102</sup>*Sedgwick Group Plc v. Johns-Manville Fibreboard Corp.*, [1985] 1 W.L.R. 331, 337-338, 1985 WL 311458 (HL 1985) (In re Asbestos Insurance Coverage Cases) (Lord Fraser).

<sup>103</sup>*Boeing Co v. PPG Industries*, [1988] 3 All E.R. 839, 1988 WL 624452 (CA (Civ Div) 1988).

<sup>104</sup>*Sedgwick Group Plc v. Johns-Manville Fibreboard Corp.*, [1985] 1 W.L.R. 331, 338, 1985 WL 311458 (HL 1985) (In re Asbestos Insurance Coverage Cases).

<sup>105</sup>Graig J. Alvarez, *Conducting Discovery in Foreign Countries*, in *Int'l Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts* 292 (David J. Levy ed., 2003); see also Darrell Prescott & Edwin Alley, *Effective Evidence-Taking Under The Hague Evidence Convention*, 22 *Int'l Law.* 939, 954 (1988); Lawrence W. Newman & David Zaslow, *Litigating Int'l Commercial Disputes* 144 (1996) ("the Article 23 restrictions are not as broad as they may first appear").

<sup>106</sup>This list does not tally to 14 because one respondent did not indicate the country from which documents were obtained.

countries at issue were France (5), the United Kingdom (3), and Switzerland (2). In 4 other instances, the foreign judicial authority "blue penciled" the request and compelled production of some of the documents requested (in Germany, the Netherlands, the United Kingdom, and Venezuela). One respondent, who had utilized the Convention procedures multiple times in France, indicated that he had obtained the requested documents in certain instances but not in others.

The reasons given for the denial of document requests were as follows:

| Reason for Denial                                                                                                                                    | Response Total |
|------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| The foreign country deemed the request as one for "pretrial discovery" (the United Kingdom—4 respondents; Switzerland—2; Germany—1; Netherlands - 1) | 8              |
| The documents were not identified with sufficient specificity (Hong Kong, Italy, the United Kingdom, Venezuela)                                      | 4              |
| A claim of privilege (Germany, Switzerland, France)                                                                                                  | 3              |
| Other:                                                                                                                                               |                |
| "fishing expedition" (Netherlands)                                                                                                                   | 1              |
| "no real compulsion, witness and docs never appeared" (France)                                                                                       | 1              |
| "names of plaintiffs were not revealed; Court insisted that true names of plaintiffs be provided" (France)                                           | 1              |
| "blocking statute" (France)                                                                                                                          | 1              |
| "simply declined without particular explanation" (France)                                                                                            | 1              |
| "the local court deemed the request improper and questioned the jurisdiction of the US court" (Switzerland) <sup>107</sup>                           | 1              |

The denials partly reflect the stringent criteria applied by foreign courts in evaluating whether a letter of request constitutes an investigatory exercise to "discover" or "fish out" documents, as opposed to an effort to obtain for use as evidence documents already known to exist, but they are also partly attributable to a lack of understanding of those criteria among many American lawyers. English commentators have observed that U.S. lawyers often send letters of request that are deficient on their face, frequently including American-style Rule 34 boilerplate instructions that the requests

<sup>107</sup>This response pertained to discovery in the Holocaust-related litigation against Swiss companies.



are "continuous in nature" and that the respondents are obliged to serve "supplemental documents up to the time of trial."<sup>108</sup>

This problem is compounded by the refusal of many foreign courts to "blue pencil" partially deficient requests. Furthermore, even in jurisdictions in which judges will blue-pencil a request by striking out offending words, as in the United Kingdom, they will not undertake the task of "restructuring, or recasting, or rephrasing the foreign request."<sup>109</sup> As noted by one international litigation support firm: "Do not assume that the foreign judge will 'blue-pencil' or partially execute your Request; in our experience, perceived defects in the Request often result in its being rejected in its entirety. Don't shoot for the stars in the hope you will end up with the moon,"<sup>110</sup> yet American courts and litigants sometimes take precisely that approach.<sup>111</sup>

A trend toward greater tolerance of American document requests may be emerging from what might be perceived as a surprising source—France. The French Article 23 reservation provides that "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" will be executed "when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure." In a recent case involving a letter of request from a California court, the Paris Court of Appeal (Cour d'Appel)<sup>112</sup> observed that inasmuch as the applicant did not have the documents in its possession, "an

<sup>108</sup>See, e.g., Barry Donnelly & Bruce Lincoln, Obtaining Evidence in England in Aid of US Proceedings: Recent Lessons Unheeded By US Litigants, *Int'l Litig. News* 38, 39 (July 2002).

<sup>109</sup>*Westinghouse Electric Corp Uranium Contract Litigation* MDL Docket 235 (No.2), [1978] A.C. 547, 1977 WL 58879 (HL 1977). See also *APA Excelsior v. Premiere Technologies Inc.*, [2002] EWHC 2005, 2002 WL 31523279 (U.K. QBD 2002) (court declined to blue-pencil an overbroad request); *Refco Capital Markets Ltd v. Credit Suisse First Boston Ltd*, [2001] C.P. Rep. 15, 2001 WL 1347093 (CA (Civ Div) 2001) ("it would be quite impossible to attempt some further blue-pencil exercise"); *Minnesota v. Philip Morris Inc.*, [1998] I.L. Pr. 170, 1997 WL 1105492 (CA (Civ Div) 1997) ("this is not a case where blue-pencilling is appropriate").

<sup>110</sup>Cara LaForge, Lessons from the Trenches: Practical Tips on Taking Compulsory Evidence Abroad, ABA Teleconference Seminar on International Evidence Taking and Service of Process After the 2003 Hague Special Commission (Mar. 23, 2004), 3.

<sup>111</sup>See, e.g., *Tulip Computers Intern. B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 475 (D. Del. 2003) (In granting motion for issuance of Hague letter of request, court held that if the proponent's "document requests are overly broad under the law of the Netherlands, as Tulip maintains, then the requests will presumably be narrowed by the appropriate judicial authorities in the Netherlands before any documents are produced").

<sup>112</sup>The Cour d'Appel of Paris is one of 30 courts of appeal in France. The Cour d'Appel stands just below the highest court, the Cour de Cassation, in the judicial hierarchy.

exact description of the documents could not be expected.”<sup>113</sup> The court then determined that the documents were described with a reasonable degree of specificity, even though the time period covered by portions of the request was broadly defined from “January 1, 1990 to the present.” The court ordered that the documents be produced and awarded 15,000 Euros in legal costs to the proponent of the request. One of the attorneys in the case offers an interesting insight based on discussions with one of the French judges on the panel. The judge, who is active in international arbitration circles, indicated that in applying the French Article 23 reservation he drew from current practice in international arbitration proceedings, including the 1999 International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration.<sup>114</sup> The IBA Rules were drafted by a working group of both civil and common lawyers and allow parties to seek production “of a narrow and specific . . . category of documents,” as opposed to merely documents that are identified individually.<sup>115</sup> It might be tempting to view the Paris court’s decision as an anomaly rather than as a harbinger of greater acceptance of American document requests; however, the French delegation to the 2003 Hague Special Commission specifically highlighted the case as representative of France’s application of Article 23.<sup>116</sup> Professor Lowenfeld predicted in 1997 that the emerging consensus among international arbitrators regarding the permissible scope of document discovery might serve

<sup>113</sup>CA Paris, 1e ch., Sept. 18, 2003, *Marc Ladreit de LeCharrière v. Cal. Comm’r of Ins.*, Case No. 2002/18509.

<sup>114</sup>This information was shared with the author by Alexander Blumrosen (Bernard-Hertz-Bejot, Paris), who represented the proponent of the letter of request (the California Commissioner of Insurance). It bears emphasizing that the IBA Rules and other elements of international arbitral procedure obviously were not binding on the court or, indeed, referred to in the court’s decision. Rather, the judge used them as an internal reference point in deciding an issue of French law.

<sup>115</sup>See IBA Rules, art. 3.3. See also George M. von Mehren & Claudia T. Salomon, *Submitting Evidence in an Int’l Arbitration: The Common Lawyer’s Guide*, 20 J. Int’l Arb. 285 (2003) (noting that the 1999 IBA Rules “are becoming a significant reference point, if not adopted in full, in most international arbitrations”).

<sup>116</sup>See, e.g., *Réponses françaises aux questions adressées par le Bureau Permanent de la Conférence concernant l’application de la Convention du 18 mars 1970 sur l’obtention des preuves à l’étranger en matière civile ou commerciale* [Responses of France to the Questions Addressed by the Permanent Bureau of the Hague Conference concerning the Application of the Convention of March 18, 1970 on The Taking of Evidence Abroad in Civil or Commercial Matters]. See also Nathalie Meyer-Fabre, *L’Obtention des Preuves à L’Etranger* [Obtaining Evidence from Abroad], *Travaux Du Comité Française De Droit International Privé—2002–2004* [Works Of The French Committee On Private International Law—002-2004] (Ed. Pedone, forthcoming 2005), at 9 (citing the *LeCharrière* case as signaling greater tolerance of American document requests).



as model for civil procedure.<sup>117</sup> The decision of the Paris Court of Appeal is perhaps a step in that direction.

### E. Denial of requests for oral testimony that are deemed to constitute "pretrial discovery"

Article 23 of the Hague Evidence Convention applies on its face only to requests for pretrial discovery of documents. There is no counterpart provision in the Convention with respect to oral depositions. Nevertheless, a few countries extend the distinction between letters of request for the purpose of obtaining "evidence," on the one hand, and for "pretrial discovery" on the other, to requests for oral depositions. In these jurisdictions, requests for oral depositions which the court deems are being sought for "pre-trial discovery" or "fishing" may be denied.

This interpretation is most prevalent, not in civil law countries,<sup>118</sup> which one would assume to be more hostile to American-style discovery but, rather, in England and, to varying degrees, certain other current and former British Commonwealth jurisdictions.<sup>119</sup> In part, this may be explained by the nature of pretrial discovery

<sup>117</sup>Andreas Lowenfeld, *The Elements of Procedure: Are They Separately Portable?*, 45 Am. J. Comp. L. 649, 652, 653-654 (1997). See also James A.R. Nafziger, *Another Look at the Hague Evidence Convention After Aérospatiale*, 38 Tex. Int'l L.J. 103, 115-116 (2001) ("Perhaps experience under the IBA Rules will further encourage the bar and, by extension, the bench to strike an acceptable balance between the quest for information and sovereign constraint of legal tourism or fishing expeditions.").

<sup>118</sup>See, e.g., Thierry Bernard & Hedmige Vlasto, France, in *Transnational Litigation—A Practitioner's Guide*, at FRA-85 (John Fellas ed., 2003) (stating the French position that "the possibility to refuse execution, as provided under Article 23 [of the] Hague Evidence Convention, concerns only the production of documents. 'Pretrial discovery of documents' is interpreted narrowly," and "requests for other 'pretrial' measures of taking evidence" are not precluded). The Italian delegate to the 2003 Special Commission expressed the same position. See Hague Conference on Private International Law, *Proces-Verbal/Minutes* (No. 4) of the Special Commission on the Practical Operation of the Service, Evidence, and Legalisation Conventions, at 14 (Oct. 28, 2003).

<sup>119</sup>See, e.g., *British American Tobacco Australia Services Ltd v. Eubanks*, [2004] N.S.W.C.A. 158, 2004 WL 1099986 (NSWCA 2004) (Court of Appeal of the Supreme Court for New South Wales applied English precedents holding that "there is no logical basis for distinguishing between document discovery and oral examinations before trial," but nevertheless upheld U.S. letters of request); Peter J. Perry, Australia, in *Obtaining Evidence In Another Jurisdiction In Business Disputes*, 9-11 (Charles Platto & Michael Lee eds., 1993) (noting that Australian courts have "adopted a more lenient approach than the English approach," but also citing a New South Wales decision denying a request from a Florida court for oral depositions as "part of a pre-trial discovery procedure amounting to the administration of unlimited oral interrogatories . . . [which is] unknown to the law of New South Wales"); Response of the Hong Kong S.A.R. of the P.R.C. to the Questionnaire on the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, ¶ 6 ("the Hong Kong legal infrastructure



(termed "disclosure") in England. Under English law, parties are generally permitted to discover certain classes of documents from other parties, but discovery from non-parties and oral depositions (from either party or non-party witnesses) are rarely permitted.<sup>120</sup> English distaste for American discovery practices might also result from their very familiarity with them. Indeed, it was the United Kingdom delegation, rather than that of any civil law country, which championed Article 23 of the Hague Evidence Convention.<sup>121</sup>

## 1. Survey responses concerning the United Kingdom

Prior to detailing the concerns of certain respondents regarding their experience in the United Kingdom, it should be emphasized that most respondents seemed satisfied with the disposition of their requests by the United Kingdom courts.<sup>122</sup> Although 21 respondents indicated having utilized the letter of request procedure in the United Kingdom, only 10 selected that country for their focused response,<sup>123</sup> which might imply that the other 11 did not encounter significant problems. Furthermore, 8 of the 10 who focused their responses on the United Kingdom had no convention experience with any other country and the United Kingdom was thus the only country as to which they could respond. With regard to the 10 respondents who focused on the United Kingdom, four indicated that their experience was "more satisfactory" than they had anticipated prior to first using it, four responded that it was "less

implementing requests for taking of evidence from other jurisdictions excludes 'discovery' altogether.").

<sup>120</sup>In lieu of depositions, English practice relies upon exchanges of written witness statements to avoid surprise at trial. See Civ. Proc. Rules, part 32.

<sup>121</sup>David McClean, *International Co-Operation in Civil and Criminal Matters* (2002), 122.

<sup>122</sup>See, e.g., *Apple Computers Inc v. Doe*, [2002] E.W.H.C. 2064, 2002 WL 31476324 (U.K. QBD 2002) (allowing depositions in support of California action); *Miller v. Endo Pharmaceuticals Inc*, [2003] E.W.H.C. 3122, 2003 WL 23014848 (Ch D 2003) (upholding letter of request from Southern District of New York for depositions of three witnesses); *LNP Engineering Plastics, Inc. v. Miller Waste Mills, Inc.*, 77 F. Supp. 2d 514 (D. Del. 1999), *aff'd in part, rev'd in part*, 275 F.3d 1347, 61 U.S.P.Q.2d (BNA) 1193 (Fed. Cir. 2001).

<sup>123</sup>After asking respondents to indicate the countries with which they had convention experience, the questionnaire included the following instruction: "[I]f you have participated in Convention discovery of evidence from more than one country, we ask that you choose *only one* such country and answer the following questions as to *only that country*. Please select the country with respect to which you believe your experience would be most helpful to the Hague Conference. Obviously, we would be delighted if you would complete separate questionnaires as to each country for which you have Convention experience, and we encourage you to do so." (Emphasis in original).

satisfactory", and two responded, "I don't know."<sup>124</sup> Five of eight indicated that they were "glad" they had utilized the procedure in the United Kingdom and would initiate it again under the same circumstances. Outside of the survey, indications of effective use of the letter of request procedures by American litigants in the United Kingdom can also be found in reported cases.<sup>125</sup>

Nevertheless, the few survey respondents who indicated a negative experience expressed very strong sentiments. For instance, one respondent stated: "Concerning my experience in attempting to obtain American discovery in the United Kingdom, if told I must resort to the Hauge (sic) Convention to obtain necessary discovery in the United Kingdom—I will run from the room screaming."<sup>126</sup> Another respondent indicated that:

We faced severe hostility to our request because of the "fishing expedition" reputation that has been given to US discovery practice. We obtained a letter request in a case in the federal court in New York to question several witnesses residing in England, and started a proceeding in London, United Kingdom, to enforce it, including getting an "Examiner" appointed by the court in London. However, the court in London later decided the request was not enforceable. The questioning was opposed by an English entity (that was not a party to the action in New York), but which was fearful that the witnesses (employees and former employees) might give answers which could create liability problems. To protect them, the court ruled that the letter request lacked sufficient detail on the subjects for the questioning and issued a decision that cited the witness protection attitudes in case law and the provisions of English statutory enactments on the subject . . . . We were told that to pass muster in England the letter request

<sup>124</sup>Two of the respondents who answered as to the United Kingdom did not respond to this particular question.

<sup>125</sup>See, e.g., *Apple Computers Inc v. Doe*, [2002] E.W.H.C. 2064, 2002 WL 31476324 (U.K. QBD 2002) (allowing depositions in support of California action); *Miller v. Endo Pharmaceuticals Inc*, [2003] E.W.H.C. 3122, 2003 WL 23014848 (Ch D 2003) (upholding letter of request from Southern District of New York for depositions of three witnesses); *LNP Engineering Plastics, Inc. v. Miller Waste Mills, Inc.*, 77 F. Supp. 2d 514 (D. Del. 1999), *aff'd in part, rev'd in part*, 275 F.3d 1347, 61 U.S.P.Q.2d (BNA) 1193 (Fed. Cir. 2001).

<sup>126</sup>She explained further that: "We won at the trial court in the United Kingdom. Defendants then appeared and we lost at the intermediate court after being forced to hire a 'silk' and a second barrister. The reported decision makes clear that because we were seeking 'discovery' under Fed. R. Civ. P. 26 and 'discovery' is not allowed under English law because 'discovery' amounts to a fishing expedition—we were not going to get the information we sought—at all! I have no confidence that any American litigant will ever receive discovery they seek from a United Kingdom court under the Hauge [sic] convention. The 'silk' I hired told me we would never win as long as Rule 26 contained the word 'discovery.' My experience convinced me that despite the fact the United Kingdom is a signator of the Hauge [sic] Convention, it will never respect American discovery requests. Further, American litigants will bear the expense of a losing attempt in the United Kingdom courts where the loser pays."



from the US court needed to give specific reasons why the questioning was relevant and necessary for the evidence at trial and should have included a list of the questions to be asked. Essentially the petition submitted to get the US court to issue the letter request needed to anticipate and answer the opposition we faced in England. Our efforts to provide these details to the London court, as a response to the local opposition, were rejected on the basis that they had not been considered by the US court. Our effort to get documents was also rejected.

Yet another respondent complained that "[t]he High Court judges' occasional purposeful misunderstanding of U.S. procedures leads to too many denied requests." At least one U.S. court has also noted difficulties with letters of request to the United Kingdom. In *First American Corp. v. Price Waterhouse LLP*, the court observed that: "A letter of request served by First American in the same underlying lawsuit has been the subject of enforcement proceedings in Britain. The letter of request sought the testimony and documents of specific PW-United Kingdom partners. The English court refused to enforce the letter of request, because First American was seeking pretrial discovery not provided for under the Hague Convention or British law."<sup>127</sup>

To some extent, such dissatisfaction arises from the United Kingdom's long-standing refusal to honor requests for documents that are not identified with a high degree of particularity. Indeed, all four respondents who indicated that their experience with the United Kingdom was "less satisfactory" than anticipated had requested documents and did not obtain them. Four other respondents who did obtain the documents requested, and a fifth who received some of the documents through a "blue pencil" exercise, indicated that they were "glad" they had used the Convention.

Nevertheless, the survey responses also raise what may be a more fundamental concern regarding oral depositions. As discussed in the following section of this article, several recent reported English cases have applied restrictive standards to letters of request from the United States for oral depositions and not merely to requests for document discovery.

## 2. Reported English cases involving letters of request from the United States

In a pre-Hague Evidence Convention case, *Radio Corp. of America v. Rauland Corp.*,<sup>128</sup> the English Court of Appeal considered letters rogatory issued from a U.S. district court in connection with an

<sup>127</sup>*First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998).

<sup>128</sup>*Radio Corp of America (RCA) v. Rauland Corp (No.2)*, [1956] 1 Q.B. 618, 1956 WL 17650 (U.K. QBD 1956).



antitrust action. In the opinion denying the request, Lord Goddard observed:

[T]his is merely an attempt to get evidence in the course of discovery proceedings which are known to the American courts . . . [as] a sort of pre-trial before the main trial. It is an endeavour to get in evidence by examining people who may be able to put the parties in the way of getting evidence. That is mainly what we should call a "fishing" proceeding which is never allowed in the English courts.<sup>129</sup>

The court distinguished between discovery of "such material as may be strictly relevant to the issues in the action such as might be admissible on the hearing of the action"—which was permissible—and "the obtaining of material which might lead to a line of inquiry which would itself disclose relevant material"—which was not permitted.<sup>130</sup>

The United Kingdom Evidence Act<sup>131</sup>, enacted after the United Kingdom's accession to the Convention, drew a similar distinction, prohibiting courts from making an order requiring "any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings" in the English court. In accordance with that provision, the English rules distinguish between: (a) evidence in the nature of proof to be used for the purposes of the trial; and (b) evidence in the nature of pre-trial discovery to be used for purposes of a train of enquiry which might produce evidence for trial. A letter of request will be granted as to the former, but not the latter.

In a significant post-Hague Evidence Convention decision rendered by the House of Lords in 1977, *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*,<sup>132</sup> Lord Diplock stated that the Evidence Act:

[P]rohibits the making of an order for the examination of a witness not a party to the action for the purpose of seeking information which, though inadmissible at the trial, appears to be reasonably calculated to lead to the discovery of admissible evidence. This is permitted by rule 26 of the U.S. Federal Rules of Civil Procedure.<sup>133</sup>

Yet Lord Diplock also indicated that he "would not be inclined to place any narrow interpretation on the phrase 'evidence . . . to be

<sup>129</sup>*Radio Corp of America (RCA) v. Rauland Corp* (No.2), [1956] 1 Q.B. 618, 1956 WL 17650, ¶18 (U.K. QBD 1956) (Goddard, J.).

<sup>130</sup>*Radio Corp of America (RCA) v. Rauland Corp* (No.2), [1956] 1 Q.B. 618, 1956 WL 17650, ¶15 (U.K. QBD 1956) (Devlin, J.).

<sup>131</sup>Evidence (Proceedings in Other Jurisdictions) Act, 1975 c 34.

<sup>132</sup>*Westinghouse Electric Corp Uranium Contract Litigation MDL Docket 235* (No.2), [1978] A.C. 547, 1977 WL 58879 (HL 1977).

<sup>133</sup>*Westinghouse Electric Corp Uranium Contract Litigation MDL Docket 235* (No.2), [1978] A.C. 547, 634, 1977 WL 58879 (HL 1977).

obtained for the purposes of civil proceedings.'"<sup>134</sup> He stated further that the court should generally "be prepared to accept the statement by the requesting court" as to the purpose of the examination and should not refuse a letter of request unless it is "satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the court."<sup>135</sup> Likewise, in the same case, Lord Keith opined:

In the face of a statement in letters rogatory that a certain person is a necessary witness for the applicant, I am of the opinion that the court of request should not be astute to examine the issues in the action and the circumstances of the case with excessive particularity for the purposes of determining in advance whether the evidence of that person will be relevant and admissible. That is essentially a matter for the requesting court.<sup>136</sup>

Thus, while strictly scrutinizing the document requests, *Westinghouse* applied a relatively liberal standard regarding requests for oral testimony that was highly deferential to the requesting court.

Similarly, in a 1985 case, *In re Asbestos Insurance Coverage Cases*,<sup>137</sup> the House of Lords upheld a challenge to a document request, but allowed oral depositions to proceed, observing:

Each of these three appellants admits that he is in a position to give some evidence that is relevant to the co-ordination proceedings. It may be that they will be asked for evidence about matters which are out with their experience, and which they are not qualified to deal with. If so, they can say so. It would be quite inappropriate, even if it were possible, for this House or any English court to determine in advance the matters relevant to the issues before the Californian courts on which each of these witnesses is in a position to give evidence.<sup>138</sup>

Based on such rulings, most commentators have noted the difficulties of obtaining documents from the United Kingdom but have concluded, in contrast, that "[r]equests for oral testimony will generally be granted where the letter of request states that a person is a necessary witness."<sup>139</sup>

That no longer appears to be the case. In an influential 1986

<sup>134</sup>*Westinghouse Electric Corp Uranium Contract Litigation* MDL Docket 235 (No.2), [1978] A.C. 547, 633, 1977 WL 58879 (HL 1977).

<sup>135</sup>*Westinghouse Electric Corp Uranium Contract Litigation* MDL Docket 235 (No.2), [1978] A.C. 547, 634, 1977 WL 58879 (HL 1977).

<sup>136</sup>*Westinghouse Electric Corp Uranium Contract Litigation* MDL Docket 235 (No.2), [1978] A.C. 547, 654, 1977 WL 58879 (HL 1977).

<sup>137</sup>*Sedgwick Group Plc v. Johns-Manville Fibreboard Corp*, [1985] 1 W.L.R. 331, 1985 WL 311458 (HL 1985) (*In re Asbestos Insurance Coverage Cases*).

<sup>138</sup>*Sedgwick Group Plc v. Johns-Manville Fibreboard Corp*, [1985] 1 W.L.R. 331, 339, 1985 WL 311458 (HL 1985) (*In re Asbestos Insurance Coverage Cases*).

<sup>139</sup>Darrell Prescott & Edwin Alley, *Effective Evidence-Taking Under The Hague Evidence Convention*, 22 Int'l Law. 939, 972 (1988). See also Robert C. O'Brien, *Compelling the Production of Evidence by Non-Parties in England Under the*

article, Sir Lawrence Collins challenged the "myth" that had "developed that the power of reservation under Article 23 for pre-trial discovery of documents means that the contracting states are bound to execute letters rogatory from the United States . . . seeking oral depositions for discovery purposes."<sup>140</sup> Collins argued that requests for oral depositions for "pretrial discovery" purposes are no less objectionable than pretrial document discovery.<sup>141</sup> Acknowledging the narrow literal scope of Article 23, Collins allowed that it was "perhaps only partially successful in drafting terms,"<sup>142</sup> but nevertheless maintained that "the representatives of the United Kingdom could not have intended 'evidence' to include discovery, since it was well established in the English case law that 'evidence' or 'testimony' is material in the nature of proof for the trial."<sup>143</sup> Collins concedes that "the practice of the English courts under the 1975 Act is not conclusive evidence of the meaning of the 1970 Convention," but suggests that the English case law is at least indicative of the British delegation's intent in proposing Article 23.<sup>144</sup> He also acknowledges that "between 1976 and 1985 the prevailing orthodoxy in the discussions at the Hague Conference" held to the view that the restriction on "pretrial discovery" applied

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Hague Convention, 24 *Syracuse J. Int'l L. & Comm.* 77 (1998) ("United States courts have apparently adequately demonstrated that requested evidence is intended for use at trial merely by making the recital and noting the date of the pending trial and, where appropriate, that the discovery cut-off date in the underlying case has passed."); Edward L. Kling, United Kingdom, in *Antitrust Trial Practice Handbook Series Volume 1: Obtaining Discovery Abroad* at 27 (John F. McClatchey et al. eds., 1990) ("The potentially extraordinary hurdle that needs to be overcome in relation to documents is not the same in the case of oral testimony."); Charles Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States*, 16 *Int'l Law.* 757 (1982) ("In our experience [in the United Kingdom], the deposition request which obtained only a general description of the subject matter of the examination, was approved in the first instance, but the document request was closely scrutinized.").

<sup>140</sup>Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 *Int'l Comp. L.Q.* 765, 780 (1986).

<sup>141</sup>Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 *Int'l Comp. L.Q.* 765, 780 (1986) ("There is no difference in principle between documentary and oral discovery in this respect.").

<sup>142</sup>Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 *Int'l Comp. L.Q.* 765, 780 (1986).

<sup>143</sup>Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 *Int'l Comp. L.Q.* 765, 777 (1986).

<sup>144</sup>Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 *Int'l Comp. L.Q.* 765, 781 (1986).



only to documents.<sup>145</sup> Nevertheless, according to one commentator, Collins' "view is now widely accepted in England."<sup>146</sup>

That view is certainly reflected in recent case law.<sup>147</sup> A solicitor who regularly handles letters of requests to England on behalf of U.S. government agencies has observed that "[i]t is becoming increasingly difficult to obtain orders for witnesses to give evidence for foreign, especially United States proceedings."<sup>148</sup> In several reported cases, requests for oral depositions have been deemed to constitute "fishing" and have been disallowed.<sup>149</sup> In a few cases, English courts have cited Article 23 as applying to all "pretrial discovery" from non-parties, including oral depositions:

Once again time and money is being spent in the English courts over Letters Rogatory requesting the English court to order the production of documents *and oral depositions* from third parties to litigation in the United States of America. That time and money would be unnecessary, if those seeking the request from the United States Court appreciated the differences between the attitude of the United States Courts to the making of "discovery" orders against non-parties, and the attitude of the English court to the making of such orders. *The United Kingdom, when becoming parties to the Hague convention concluded in 1970, registered a reservation pursuant to Article 23 which became enshrined in the Evidence (Proceedings in Other Jurisdictions) Act 1975 making it clear that discovery against non-parties was something the English court would not provide because it simply was not part of its procedure.*<sup>150</sup>

In denying requests from the United States, English courts now routinely look behind recitals in the letter of request indicating that the deposition is sought for use at trial, sometimes combing the

<sup>145</sup>Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Misunderstanding?*, 37 Int'l Comp. L.Q. 765, 782 (1986). Indeed, outside of England and a few other common law jurisdictions influenced by English precedent, that still seems to be the prevailing view.

<sup>146</sup>Campbell McLachlan, *Obtaining Evidence in England in Aid of a US Proceeding*, 77 PLI/Comm 181, 184 (1998); see also David McClean, *International Co-Operation in Civil and Criminal Matters* (2002), 123.

<sup>147</sup>See, e.g., *Minnesota v. Philip Morris Inc.*, [1998] I.L. Pr. 170, 1997 WL 1105492 (CA (Civ Div) 1997) (citing Collins' article with approval).

<sup>148</sup>Steven Loble, *Jurisdiction and Evidence—An English Perspective*, 4 ILSA J. Int'l & Comp. L. 489, 511 (1998).

<sup>149</sup>See, e.g., *Minnesota v. Philip Morris Inc.*, [1998] I.L. Pr. 170, 1997 WL 1105492 (CA (Civ Div) 1997); *Lloyd's Register of Shipping v. Hyundai Mipo Dockyard*, 2001 WL 1422850 (U.K. QBD 2001); *Securities and Exchange Commission v. Credit Bancorp Ltd*, 2001 WL 239754 (U.K. QBD 2001) (upholding letter of request with respect to one witness, but denying it as to another).

<sup>150</sup>*Refco Capital Markets Ltd v. Credit Suisse First Boston Ltd*, [2001] C.P. Rep. 15, 2001 WL 1347093, ¶ 1 (CA (Civ Div) 2001) (emphasis added). See also *APA Excelsior v. Premiere Technologies Inc.*, [2002] EWHC 2005, 2002 WL 31523279 (U.K. QBD 2002).

moving papers to the U.S. court for references to the word "discovery."<sup>151</sup>

In one recent case, the court acknowledged that the witness "is someone who could at trial give what in English terms would certainly be admissible evidence."<sup>152</sup> Nevertheless, the court took note that the list of topics on which the witness was to be examined included bullet points that started with the phrase "any communications between . . . ." The court observed that this might encompass not only oral communications but also written communications and that the United Kingdom's Evidence Act prohibits requiring a witness to state which documents are in his possession, custody or power.<sup>153</sup> Counsel for the proponent of the request offered a written stipulation limiting the examination to oral communications, but the court declined on the ground that the U.S. judge "did not envisage that it would be [so] confined."<sup>154</sup> After citing further concerns regarding the scope of the examination, and dismissing further offers to limit same, the court concluded that the letter of request "envisage[d] a process of discovery in the American sense, rather than the obtaining of evidence for trial." The request was denied and its proponent was assessed £70,000 in legal costs.

Lest these cases paint too negative a picture, it bears re-emphasizing the ILC survey data, which seem to suggest that the experience of American lawyers with letters of request directed to the United Kingdom is generally positive. The decisions that make their way into the Law Reports represent the tough cases. Instances in which Hague Evidence Convention requests are implemented in a routine manner do not give rise to reported decisions. Further, American letters of request have been executed even in some controversial cases. To cite a recent example, an English solicitor for British American Tobacco (Investments) Limited (BATCo) was required to give testimony in the racketeering action filed by the U.S. government against BATCo and other tobacco

<sup>151</sup>See, e.g., *Refco Capital Markets Ltd v. Credit Suisse First Boston Ltd*, [2001] C.P. Rep. 15, 2001 WL 1347093 (CA (Civ Div) 2001).

<sup>152</sup>*Gredd v. Busson*, [2003] E.W.H.C. 3001, 2003 WL 23014745 (U.K. QBD 2003).

<sup>153</sup>Evidence (Proceedings on Other Jurisdictions) Act, 1975 c 34, § 2(4).

<sup>154</sup>*Gredd v. Busson*, [2003] E.W.H.C. 3001, 2003 WL 23014745 (U.K. QBD 2003). Yet the English court also surmised elsewhere in the decision that the U.S. judge had issued the letter of request "without any real scrutiny."



manufacturers.<sup>155</sup> The English court rejected a blanket claim of attorney-client privilege in compelling the examination.<sup>156</sup>

It also bears emphasizing that all of the reported cases involve requests to non-parties, and except in anomalous cases, English civil procedure does not allow litigants to obtain discovery from non-parties; thus, scrutiny of such requests by the English courts is not surprising, especially since the non-party's interests will not usually be represented in the U.S. proceedings resulting in the issuance of the letter of request. In some cases, such scrutiny might be warranted. In *Lloyd's Register v. Hyundai*, for instance, the proponent of the request sought testimony from 26 witnesses, some of whom seemed to have only tangential information regarding the case.<sup>157</sup> Even in a U.S. court, there would be no automatic right to take that number of depositions.<sup>158</sup> In many of the reported cases, problems might have been avoided had the proponent of the request involved English counsel earlier in the process. Indeed, American lawyers would be well-advised to retain English counsel even prior to submitting the application for a letter of request to the U.S. court. A recurrent complaint in the English case law is the evident failure of American courts and litigants to appreciate the requirements of English practice.<sup>159</sup> Regardless of how the trend in the English case law might be justified, however, it unquestionably diminishes the utility of the convention for American litigants.

## F. Effectiveness of measures of compulsion of witness testimony

The Hague Evidence Convention offers a mechanism for compelling discovery from recalcitrant witnesses. Specifically, Article 10

<sup>155</sup>For background on the case, see *U.S. v. Philip Morris USA Inc.*, 321 F. Supp. 2d 87 (D.D.C. 2004), rev'd and remanded on this point, 387 F.3d 884, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 10791 (D.C. Cir. 2004) (the reversal occurred after the English court decision).

<sup>156</sup>See *United States of America v. Philip Morris Inc (No.1)*, [2004] E.W.C.A. Civ. 330, [2004] E.W.C.A. Civ. 330, 2004 WL 1054943 (CA (Civ Div) 2004). On the other hand, the court denied a request to depose one of BATCo's executives on the ground that "the letter of request is designed more to enable the United States to conduct a broad investigation into the relationships between the companies in the BAT group than to obtain Mr. Broughton's evidence on specific topics for use at the trial." *United States of America v. Philip Morris Inc (No.1)*, [2003] E.W.H.C. 3028, 2003 WL 22826975 (U.K. QBD (Comm Ct) 2003).

<sup>157</sup>See *Lloyd's Register of Shipping v. Hyundai Mipo Dockyard*, 2001 WL 1422850 (U.K. QBD 2001).

<sup>158</sup>See Fed. R. Civ. P. 30(a)(2)(A) (requiring leave of court to take more than ten depositions).

<sup>159</sup>See, e.g., *Gredd v. Busson*, [2003] E.W.H.C. 3001, 2003 WL 23014745 (U.K. QBD 2003) ("In my opinion, it was obvious (or should have been obvious) to those seeking the order in the present case that the terms of the order do not comply with English requirements.").



provides that the requested state "shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law" for internal proceedings. As indicated in the Explanatory Report for the Convention, "[t]he requesting authority cannot ask the executing authority to grant compulsion in the execution of the Letter to any extent greater than the compulsion which would be applied, under the same circumstances, in a domestic proceeding in the State of execution."<sup>160</sup>

A few respondents answered affirmatively to a question asking whether they had experienced "a situation in which the foreign judicial authority required the attendance of the witness through measures of compulsion (e.g., subpoena, etc.), but such measures did not result in the appearance of the witness."<sup>161</sup> This problem was cited most often with respect to France. One respondent commented: "use [the Convention] in France if you have to, but don't expect them to do anything if the witness refuses to show or produce [documents]." Another respondent also complained of this problem in France, adding that "the result appeared protective of [a] major French company."

The questionnaire did not inquire why witnesses failed to appear; however, Legal Language Services, Inc. provided a detailed description of the experiences of some of its clients:

LLS . . . is often surprised by the willingness of foreign judges to honor last minute requests by the witness's counsel which delay the hearing date . . . . [D]ecisions to reschedule a hearing date within 5-7 days of that date are not uncommon, especially in France, Spain and the Netherlands. It is also not uncommon for such a hearing to be rescheduled in this way 3 to 4 times, stretching overall turnaround time to 5-6 months.

Foreign hearings are expensive—LLS typically bills \$3,000-\$5,000 day for interpreters, interpreting equipment and court reporters (which must sometimes be brought in from neighboring countries) excluding the cost of hotels and transportation and the billable time of the attorneys themselves. As a result, delays and rescheduling are enormously expensive to US counsel. In some instances, the witness' counsel has managed by such tactics to frustrate US counsel to the point of abandoning the Request altogether.

This phenomenon is perhaps partly explained by the nature of

<sup>160</sup>See Philip Amram, Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. A, p.11, 92d Cong., 2d Sess. 11 (1972), reprinted in 12 I.L.M. 327 (1973).

<sup>161</sup>This question was evidently misunderstood by several respondents. Eleven respondents answered "yes" to this question but, in many cases, the remainder of the respondent's answers to the survey made it clear that the witness had, in fact, appeared, although the foreign court either upheld the assertion of an evidentiary privilege or (in the case of the U.K.) reversed a Master's order based on an objection to the deposition on the ground of "fishing." This section of the paper focuses only upon the issue of "no show" witnesses.

judicial proceedings in continental Europe. Under the civil law system of "trial by installment," last minute requests for a continuance based upon the convenience of the witness will tend to be treated more liberally than in a common law country, where "The Trial" is a concentrated, highly staged, climactic event. In certain civil law countries, non-appearance by a witness is generally punished only by a civil fine (sometimes minor), as opposed to criminal contempt sanctions.<sup>162</sup>

### G. Effect of the *Aerospátiale* decision on the scope of Federal Rules of Evidence discovery from foreign litigants

U.S. courts rarely require resort to the Hague Evidence Convention. Nevertheless, the *Aerospátiale* decision extended a degree of special protection to foreign litigants:

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position . . . . Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration.<sup>163</sup>

The *Aerospátiale* opinion essentially raises foreign litigants to the status of a protected class for whom the judge must exercise special vigilance to protect them against potentially abusive discovery tactics.<sup>164</sup> As noted by one practitioner, although U.S. courts do not typically mandate first resort to the Convention, they will often intervene to "narrow the discovery requests in ways they probably would not have for purely domestic discovery."<sup>165</sup> Indeed, foreign parties may be in a position to extract discovery concessions from

<sup>162</sup>See, e.g., Gilles de Poix, France, in Antitrust Trial Practices Handbook Series Volume 1: Obtaining Discovery Abroad, 50 (John F. McClatchey et al. eds., 1990) ("The enforcement or sanctioning powers of a French judge are more limited than those of an American judge."); Rolf Stürner, Why are Europeans Afraid to Litigate in the United States?, Conference Series of Centro di studio ricercché di diritto comparato e stramiero, 11 (M.J. Bonnell ed., 2001).

<sup>163</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 547, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).

<sup>164</sup>Daniel J. Plaine & Dale Warren Dover, Compulsory Discovery Methods: The Hague Evidence Convention, Letters Rogatory, Foreign Limits on Testimony and Document Production, in American Bar Ass'n Nat'l Inst.-Int'l Litig., 179, 209 (1989). See also Mark A. Anderson, Stranger in a Strange Land: Discovery Abroad, 24 Litig. 41, 42 (Winter 1998).

<sup>165</sup>Andrew N. Vollmer, Revive The Hague Evidence Convention, 4 Ills J.Int'l & Comp.L. 475, 479 (1998). See also *DBMS Consultants Ltd. v. Computer Associates Intern., Inc.*, 131 F.R.D. 367, 370, 18 Fed. R. Serv. 3d 33 (D. Mass. 1990) (foreign deposition of former employee of defendant ordered taken in writing rather than orally when "it would be unjust and inappropriate to request a full-blown oral ex-



the other side based on the mere threat of a motion seeking resort to the convention procedures.<sup>166</sup> Even if unsuccessful, such a motion will delay the case.

The ILC survey seems to support these views. One of the questions asked:

Have you ever been involved in a case in which a party agreed not to file a motion to require resort to the Convention letter of request procedure with respect to a foreign witness in exchange for an agreement that the discovery proceed on stipulated terms (e.g., that the deposition occur in the witness' country of residence, etc.)?

Of the 51 respondents who answered this question, 33 (65%) responded "yes." This seems to indicate that the protections extended to foreign litigants under *Aerospátiale* may be more effective than the paucity of case law requiring first resort to the convention would suggest. As stated by Born and Hoing, *Aerospátiale* "offers some sort of rough justice—less extensive and less intrusive discovery requests fulfilled unilaterally under more expeditious United States discovery rules."<sup>167</sup>

## V. The 2003 Hague Special Commission

The Special Commission met in The Hague from October 28 to November 4, 2003. The Permanent Bureau of the Hague Conference described the mission of the Commission as follows: "to promote uniform interpretation, foster mutual confidence and enhance the mutual benefits for States party to the Convention, to exchange their respective experiences in operating the Conventions, as well as to promote the benefits of the Conventions to non-party States."<sup>168</sup>

Delegates to the Special Commission were designated by the member states. They came from assorted backgrounds. Most were

amination, with the attendant time, travel and money constraints for all involved, when a simpler procedure may yield the desired information); *Valois of America, Inc. v. Risdon Corp.*, 183 F.R.D. 344, 349 (D. Conn. 1997) (approving Federal Rules of Evidence discovery, but only on the condition that the discovery requests be narrowed); *In re Bedford Computer Corp.*, 114 B.R. 2, 6 (Bankr. D. N.H. 1990); *Oxford Industries, Inc. v. Luminco, Inc.*, 1990 WL 181488, \*2 (E.D. Pa. 1990).

<sup>166</sup>See James A.R. Nafziger, Another Look at the Hague Evidence Convention After *Aerospátiale*, 38 Tex. Int'l L.J. 103, 114 (2001) ("parties are able to negotiate advantageous terms for discovery by agreeing to waive claims based on the prescriptions of the Evidence Convention"). See also *Boss Mfg. Co. v. Hugo Boss AG*, 1999 WL 20828 (S.D. N.Y. 1999) (current managing agent and former employee of German defendant agreed to waive applicability of Hague Evidence subject to deposition being conducted in Germany); *Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886 (E.D. Pa. 1998).

<sup>167</sup>Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aerospátiale Applications of the Hague Evidence Convention*, 24 Int'l Law. 393, 407 (1990).

<sup>168</sup>Permanent Bureau of the Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Special Commission on the*



officials with justice ministries or central authorities; some were diplomats or foreign ministry lawyers; others were private practitioners or academics who were appointed by their governments as technical advisers to the official state delegations. The U.S. delegation was led by an experienced State Department lawyer, Jeffrey D. Kovar.<sup>169</sup>

Special Commissions had previously been convened at The Hague to review the Hague Evidence Convention in 1978, 1985, and 1989.<sup>170</sup> In addition to reviewing the practical operation of the Hague Evidence Convention, the 2003 Special Commission also considered the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

After the conclusion of each Special Commission, the Permanent Bureau of the Hague Conference prepares a report of the recommendations and conclusions on which a degree of consensus was reached at the meeting. Such reports are intended to harmonize the application of the Convention but are, at best, "soft law." While they are not binding on the courts of the member states, they are sometimes relied upon by judges and central authorities as persuasive authority. For instance, Special Commission reports are routinely referenced by American courts interpreting the Hague Service Convention.<sup>171</sup>

With regard to the Hague Evidence Convention, the recommendations of the 1989 Special Commission have been endorsed by the New Jersey state courts. In *Husa v. Laboratoires Servier SA*,<sup>172</sup> the court explicitly adopted the Special Commission's recommendation that "priority" be given to the procedures of the Convention "when

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Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003).

<sup>169</sup>For the deliberations on the Evidence Convention, the U.S. delegation to the Special Commission also included Robert M. Hollis, Director, Office of Foreign Litigation, U.S. Department of Justice; Monica A. Gaw, Overseas Citizen Services, U.S. Department of State; and the author.

<sup>170</sup>David McClean, *International Co-Operation in Civil and Criminal Matters* 108 (2002). For an account of the 1989 Special Commission, see Edwin R. Alley, *Hague Conference on Private International Law: 1989 Special Commission Meeting on the Operation of the Hague Evidence Convention and the Hague Service Convention*, 8 B.U. Int'l L.J. 187 (1990).

<sup>171</sup>Many of these cases involve Article 10(a) of the Hague Service Convention, which addresses service by mail. See, e.g., *Brockmeyer v. May*, 383 F.3d 798, 2004 A.M.C. 2269 (9th Cir. 2004).

<sup>172</sup>*Husa v. Laboratoires Servier SA*, 326 N.J. Super. 150, 740 A.2d 1092 (App. Div. 1999); see also *Knight v. Ford Motor Co.*, 260 N.J. Super. 110, 615 A.2d 297 (Law Div. 1992).

evidence located abroad is being sought,"<sup>173</sup> unless "it is demonstrated that its use will substantially impair the search for truth . . . or will cause unduly prejudicial delay."<sup>174</sup> The *Husa* court acknowledged that this formulation was contrary to the holding in *Aerospátiale* but navigated that hurdle with the observation that "the choice is between the Convention and New Jersey procedural and substantive law. Consequently, we perceive no conflict with federal supremacy."<sup>175</sup> On the other hand, one federal district court accorded the 1989 Special Commission's recommendation "no weight because it would effectively overrule *Aerospátiale* and because it shares none of the binding authority carried by Congressional legislation or Supreme Court decisions."<sup>176</sup> The Third Circuit also recently declined to accept the recommendation of the 1989 Special Commission, although a concurring opinion by Judge Jane Roth cited the Special Commission report in urging that "the *Aerospátiale* decision . . . be reexamined to ensure that lower courts are in fact exercising 'special vigilance to protect foreign litigants' and demonstrating respect 'for any sovereign interest expressed by the foreign state.'"<sup>177</sup>

The 2003 Special Commission addressed some of the same issues considered by prior Special Commissions and also a few new ones, including agenda items which emerged from the ILC survey. The ILC issued a report on the survey findings to the U.S. State Department which, in turn, furnished a copy to the Permanent Bureau of the Hague Conference in advance of the Special Commission meeting.<sup>178</sup> The Permanent Bureau published the report on the Hague Conference website and distributed excerpts to each of the delegates to the Special Commission. Several issues raised by the

<sup>173</sup>*Husa v. Laboratoires Servier SA*, 326 N.J. Super. 150, 156, 740 A.2d 1092 (App. Div. 1999), quoting Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 I.L.M. 1556 (1989).

<sup>174</sup>*Husa v. Laboratoires Servier SA*, 326 N.J. Super. 150, 156, 740 A.2d 1092 (App. Div. 1999).

<sup>175</sup>*Husa v. Laboratoires Servier SA*, 326 N.J. Super. 150, 155, 740 A.2d 1092 (App. Div. 1999).

<sup>176</sup>*In re Vitamins Antitrust Litigation*, 120 F. Supp. 2d 45, 2000-2 Trade Cas. (CCH) ¶ 73073 (D.D.C. 2000), amended in part, 2000-2 Trade Cas. (CCH) ¶ 73103, 2000 WL 33142129 (D.D.C. 2000).

<sup>177</sup>*In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.2d 288, 306 (3d Cir. 2004) (Roth, J., concurring).

<sup>178</sup>International Litigation Committee, ABA Section of International Law & Practice, Survey of Experience of U.S. Lawyers with the Hague Evidence Convention Letter of Request Procedures (Oct. 9, 2003).

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ILC survey were addressed in a positive manner in the Special Commission's final report.

### A. The exclusivity of the Convention

Prior Special Commissions had devoted considerable attention to the question of the "priority" or "exclusivity" of the Hague Evidence Convention. The German delegation to the 2003 Special Commission also raised this issue, stating that the *Aerospatiale* decision had created a "considerable problem in international relations."<sup>179</sup> Most delegations, however, seemed resigned to the U.S. approach to the Convention as an unfortunate fait accompli. As a result, little time was spent discussing the issue, and whereas the 1989 Special Commission recommended "that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought,"<sup>180</sup> the 2003 Special Commission merely "noted that there were still differing views among states party as to the obligatory and/or exclusive character of the Convention."<sup>181</sup>

### B. Document discovery

The Special Commission observed that the terms of Article 23 of the Hague Evidence Convention "are a continued source of misunderstandings." Citing the "history" of the Article 23 provision, the Special Commission "agreed that Article 23 was intended to permit states to ensure that a request for the production of documents must be *sufficiently substantiated* so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the

<sup>179</sup>Hague Conference on Private International Law, Synopsis of the Replies to the Questionnaire Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Prel. Doc. No. 4, Oct. 2003. One sign of the German government's continued frustration with U.S. discovery demands are the amicus briefs that it periodically files on behalf of German companies resisting discovery requests in American lawsuits. See, e.g., *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 2004-1 Trade Cas. (CCH) ¶ 74294 (3d Cir. 2004); *In re Vitamins Antitrust Litigation*, 2001-2 Trade Cas. (CCH) ¶ 73338, 2001 WL 1049433 (D.D.C. 2001).

<sup>180</sup>Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 I.L.M. 1556 (1989), 27, ¶ II.c.

<sup>181</sup>Permanent Bureau of the Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), ¶ 37.



proceeding."<sup>182</sup> The Special Commission also observed that "in some instances where States have made a general, non-particularised declaration under Article 23, they may have mistakenly believed that they are only objecting to evidence requests submitted prior to the opening of a proceeding in the State of origin."<sup>183</sup>

One might expect that such misconceptions would have been cleared up by prior Special Commission reports. For instance, the 1985 Special Commission made the following observation:

The U.S. Experts emphasized as they had done in 1978 that the expression "pre-trial" does not literally mean: "before the commencement of the proceedings." The fact-finding process can only be engaged after institution of civil proceedings, i.e. after a complaint has been filed with the court and summons been served on the defendant.<sup>184</sup>

Nevertheless, confusion continues to exist on this point. For instance, at the 2003 Special Commission meeting, a delegate from Ukraine, which ratified the convention in 2001, indicated that her country had entered an Article 23 reservation based on the same misunderstanding.<sup>185</sup> Likewise, a Belgian legal scholar recently described American discovery as follows:

In the United States, documentary evidence is often requested by the claimant in a specific discovery procedure that precedes the actual lawsuit. The extent of this pre-trial discovery can often be so wide that its only purpose is to obtain possession of previously unknown in-

<sup>182</sup>Permanent Bureau of the Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), 7 (emphasis in original).

<sup>183</sup>Permanent Bureau of the Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), 8 (emphasis in original).

<sup>184</sup>Hague Conference on Private International Law, Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 I.L.M. 1668, 1674 (1985), § 4.

<sup>185</sup>Hague Conference on Private International Law, Proces-Verbal/Minutes (No. 4) of Special Commission on the Practical Operation of the Service, Evidence and Legalisation Conventions, 11 (Oct. 28, 2003). Russian legal scholars have expressed the same misunderstanding. See Vladislav V. Starzhenetskii, Kommentarii k Gaagskoi Konventsii 1970 goda o poluchenii za granitsei dokazatel'stv po grazhdanskim ili torgovym delam [Commentary on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970], in *Grazhdanin I Predprinimatel' V Rossiiskom I Zarubezhnom Sude: Pravovaya Pomoshch* [The Citizen and Entrepreneur in Russian and Foreign Court: Judicial Assistance] 100-101 (2002) (stating that American pretrial discovery enables a party to "obtain, even before the institution of legal proceedings, access to documents at the disposal of the opposing party for preparation of the complaint and for future legal proceedings").

criminating documents from the defendant (so-called "fishing expedition").<sup>186</sup>

Such misunderstandings seem to arise in part because civil law systems do not typically recognize distinct "pretrial" and "trial" phases in civil litigation.<sup>187</sup>

Hoping to rectify some of the misconceptions regarding the nature of pretrial discovery, the 2003 Special Commission recommended that "states which have made a general, non-particularised declaration under Article 23 *revisit their declaration* by considering an amendment adopting terms such as those contained in the United Kingdom [Article 23] declaration or in Article 16" of the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad.<sup>188</sup> The latter provides for the production of documents that are "reasonably identified by date, contents, or other appropriate information," which allows for potentially broader discovery than the United Kingdom reservation.<sup>189</sup>

<sup>186</sup>Hans Van Houtte, *The Law of International Trade* 368 (2d ed. 2002).

<sup>187</sup>Since cases are decided by a judge, rather than a jury, civil proceedings tend not to culminate in a "trial" in the sense of a single, concentrated event in which jurors from the community gather to hear testimony, consider evidence, and render a verdict. Rather, the typical civil proceeding in a civil law country consists of a series of meetings and written communications between attorneys and the judge, with evidence, testimony, motions, and rulings presented in installments. Pretrial discovery, whereby each side is afforded a preview of the other's proof in order to prepare for trial, is perhaps less essential to a system of trial by installment than it is to the common law system in which the "trial" constitutes a culminating event. See Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 *Notre Dame L. Rev.* 1017 (1998). There is, however, a trend in some civil law countries toward greater concentration of the proceedings. See Kuo-Chang Huang, *Introducing Discovery Into The Civil Law: A Comprehensive Study of Discovery Through Comparative Civil Procedure* 74-80 (2003).

<sup>188</sup>Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 *I.L.M.* 1556 (1989) (emphasis in original). Note that the U.S. ratification of the Inter-American Convention on Taking of Evidence Abroad in Civil and Commercial Matters precludes the use of letters rogatory for the purpose of taking evidence. The text of the Inter-American Convention on Taking of Evidence Abroad in Civil and Commercial Matters, along with its Protocol, and information on all ratifications and declarations, may be found at 28 *U.S.C.A.* § 1781.

<sup>189</sup>Under the Inter-American Protocol, the letter of request must also specify the requesting party's basis for believing that the documents were in the possession, custody or control of the requested party. In addition, the Protocol authorizes signatories to require that the requesting party identify the relationship between the evidence or information requested and the pending proceeding. Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Com-



Prior Special Commissions made similar recommendations in 1978,<sup>190</sup> 1985,<sup>191</sup> and 1989,<sup>192</sup> and a few countries that had initially adopted broad Article 23 reservations modified their declarations to allow limited pretrial discovery of documents. Specifically, Denmark, Finland, Norway, and Sweden did so in 1980, and France followed suit in 1987. In *Aerospatiale*, the German government advised the U.S. Supreme Court in an amicus brief that it had "accelerated the process" of issuing regulations that would permit the partial execution of Hague Evidence Convention letters of request seeking documents;<sup>193</sup> yet Germany has never issued the regulations or modified its Article 23 reservation, partly as a consequence of the *Aerospatiale* court's decision not to require the first resort to the Convention.<sup>194</sup> Indeed, subsequent to *Aerospatiale*, no state has modified an existing Article 23 reservation, although six new contracting states to the Convention have entered limited Article 23 reservations,<sup>195</sup> and a few others have joined the convention without entering any Article 23 reservation.<sup>196</sup>

There was some reason to hope that a recommendation by the

mercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 I.L.M. 1556 (1989).

<sup>190</sup>Permanent Bureau of the Hague Conference on Private International Law, Report on the Work of the Special Commission of the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 17 I.L.M. 1425, 1428 (1978).

<sup>191</sup>Hague Conference on Private International Law, Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 I.L.M. 1668, 1674 (1985), § 4.

<sup>192</sup>Hague Conference on Private International Law, Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 28 I.L.M. 1556 (1989), 27.

<sup>193</sup>Brief for the Federal Republic of Germany as Amicus Curiae, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 9–10 (Aug. 22, 1986), 1986 WL 828492.

<sup>194</sup>See Dr. Axel Epe, Germany, in antitrust trial practice handbook series volume 1: discovery abroad, 70–71 (John F. McClatchey et al. eds., 1990); Dirk-Reiner Martens, Germany, in *Obtaining Evidence in Another Jurisdiction in Business Disputes*, 98–99 (Charles Platto & Michael Lee eds., 1993).

<sup>195</sup>These include China (1998), Estonia (1996), Mexico (1989), Romania (2003), Switzerland (1995), and Venezuela (1993).

<sup>196</sup>These include Belarus (2001), Latvia (1995), the Russian Federation (2001), and Slovenia (2000). With respect to Russia and, most likely Belarus, this appears to have been an oversight, rather than a considered decision. The Russian Federation also failed to designate a central authority at the time of ratification. See Tatiana N. Neshataeva, *Mezhdunarodnoe Chastnoe Pravo I Mezhdunarodnyi Grazhdanskii Protsess* [Private International Law and International Civil Procedure] 520–526 (2004).



Special Commission in this area would fall on receptive ears as a few civil law countries with blanket Article 23 reservations, most notably Germany, have recently taken tentative steps to expand the obligation of litigants to disclose documents in domestic lawsuits, albeit not nearly to anything resembling U.S. discovery practice.<sup>197</sup> Nevertheless, in the short term at least, the 2003 Special Commission's recommendation that countries enter only limited Article 23 reservations does not seem to have had much effect. Three countries that joined the Convention subsequent to the 2003 Special Commission—Hungary, Turkey, and Seychelles—have all entered broad Article 23 reservations.

A few other recommendations of the 2003 Special Commission might have greater practical effect. One recommendation was directed specifically to the central authorities: "With a view to avoiding unnecessary delays where a letter of request is deficient, the SC recommended that Central Authorities or executing authorities encourage the requesting authority to reformulate and resubmit its letter of request."<sup>198</sup> The central authorities are the entry point for letters of request. By advising the requesting court of potential defects in the letter of request at an early stage, the foreign central authority can save the U.S. party substantial wasted time and expense. As central authority staff were well-represented at the Special Commission meeting, this recommendation stands a strong likelihood of being implemented.

The Special Commission also came out strongly in favor of "bluepenciling," stating: "In cases where the request appears to be partially deficient, the executing authorities should, whenever appropriate, execute the portion of a letter that is not deficient rather than to reject the entire request."<sup>199</sup> This recommendation, if implemented by foreign courts, would enhance the utility of the convention for U.S. litigants.

### C. The discovery/evidence distinction in the context of oral testimony

The U.S. delegation to the 2003 Special Commission expressed concerns regarding the growing practice by English courts of, in ef-

<sup>197</sup>See Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 *Hastings Int'l & Comp. L. Rev.* 55 (2003).

<sup>198</sup>Permanent Bureau of the Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions* (28 October to 4 November 2003), 9.

<sup>199</sup>Permanent Bureau of the Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions* (28 October to 4 November 2003), 9.

fect, applying Article 23 to requests for oral testimony. The delegates from the United States noted that the Hague Evidence Convention, on its face, restricts only "pretrial discovery of documents" and makes no reference to restrictions on requests for oral testimony. They also observed that there is a basis for different treatment of document discovery and depositions. As indicated by Geoffrey Hazard, "[a]lthough discovery depositions are more numerous and more lengthy [in the United States] than abroad, they are similar to examinations at trial in other common-law systems and examinations at hearings in civil-law systems. But document discovery American style would appear to be something unto itself."<sup>200</sup> Document discovery is "something unto itself" under the terms of the Convention as well, and Article 23 reservations should not be extended to cover requests for oral depositions.

In addition, the distinction between depositions for "discovery" and "evidence" is not tenable.<sup>201</sup> Often, an attorney will know that a witness has knowledge of matters at issue in the case and is in a position to give evidence relevant to those issues but does not know in advance what answers to the questions the witness will give. This does not turn the deposition into a "fishing expedition." If the testimony from a foreign deposition proves useful, it may be used at trial in accordance with Rule 32 of the Federal Rules of Civil Procedure (or its counterpart in state courts). If not, it will likely be used by the other side. Either way, the deposition is taken for use as "evidence."

Furthermore, the focus on evidence "in the nature of proof for the trial" does not take into account the extensive use of deposition testimony in the United States as evidence in support of motions for summary judgment. Following a trilogy of landmark U.S. Supreme Court cases decided in 1986,<sup>202</sup> summary judgment procedure has emerged in the United States as "the new fulcrum of civil

<sup>200</sup>Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1676 (1998).

<sup>201</sup>Even a few prominent English jurists have noted the difficulty in making the distinction. For instance, in *First Am. Corp. v. Sheik Zayed bin Sultan Al-Nahyan*, Justice Scott observed that:

If there is good reason to believe that the intended witness has knowledge of matters in issue at the trial so as to be likely to be able to give evidence relevant to those issues, I do not understand how an application to have the intended witness orally examined can be described as "fishing." It cannot be necessary that it be known in advance what answers to the question the witness can give. Nor can it be necessary that the answers will be determinative of one or other of the issues in the action.

*First American Corp v. Sheikh Zayed Al-Nahyan*, [1997] I.L. Pr. 179, 1998 WL 1042425 (CA (Civ Div) 1998). Nevertheless, the requests from the U.S. court were rejected as overly broad and "oppressive."

<sup>202</sup>*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 7 Int'l Trade Re. (BNA) 2057, 1986-1 Trade Cas. (CCH) ¶ 67004, 4 Fed. R. Serv. 3d 368 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.



dispute resolution."<sup>203</sup> Article 1 of the Hague Evidence Convention provides for obtaining evidence that is intended for use in any "judicial proceedings," not just trial. Indeed, proceedings need not have "commenced"; they may merely be contemplated.<sup>204</sup> Further, a 1978 Special Commission recommended that the term "evidence" be interpreted "liberally."<sup>205</sup> The summary judgment procedure is a "judicial proceeding," and deposition testimony cited in a motion is no less "evidence" than testimony presented at trial.

Finally, the caricature of U.S. discovery in the English decisions as a "fishing expedition" run amok, without judicial supervision or oversight, does not seem to take into account changes in U.S. civil procedure over the past 25 years. As noted by Arthur Miller: "Rule 26, the centerpiece of the discovery process, has undergone dramatic revisions as a result of amendments in 1983, 1993, and 2000 that provide for greater judicial control over the discovery process and set limitations on the availability of discovery."<sup>206</sup>

These points seemed to have a positive effect at the meeting. The Special Commission acknowledged changes in U.S. law "to further

242, 106 S. Ct. 2505, 91 L. Ed. 2d 202, 12 Media L. Rep. (BNA) 2297, 4 Fed. R. Serv. 3d 1041 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 4 Fed. R. Serv. 3d 1024 (1986).

<sup>203</sup>Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141 (2000). The percentage of civil cases proceeding to trial in the federal courts dropped from 8.5% of all pending cases in 1973 to just 1.8% in 2002. See Administrative Office of the U.S. Courts, 2002 Annual Report of the Director: Judicial Business of the U.S. Courts, Table C-4A. The percentage of cases terminated by summary judgment, on the other hand, more than doubled between 1975 and 2000, from 3.7% to 7.7%. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliché's Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U.L. Rev. 982, 1049 (2003).

<sup>204</sup>Hague Evidence Convention, art. 1.

<sup>205</sup>See Permanent Bureau of the Hague Conference on Private International Law, Report on the Work of the Special Commission of the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 17 I.L.M. 1425, 1428 (1978), § 2.A.

<sup>206</sup>See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliché's Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U.L. Rev. 982, 1013 to 1014 (2003). See also Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299, 301 (2002) ("The rapid pace of amendments to the federal discovery rules has brought expanded case management, discovery conferences, pretrial conferences, required attorney consultations, more stringent certification, numeric discovery limits, the concept of proportionality, mandatory disclosure, [and] a redefinition of 'scope.'"); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order*, 7 Tul. J. Int'l & Comp. L. 153, 183 (1999) ("[T]he cumulative effect of the changes that have been made [to the discovery rules] already move beyond mere tinkering . . . . [I]t could be said that America is finally eliminating the 'extravagant' features of discovery, opening the way to accommodation with the practice of the rest of the world"); Jeffrey W.

limit the scope of pretrial discovery, including by increasing the control of judges over discovery proceedings." In its final conclusions, the Special Commission endorsed the U.S. position, stating that "Article 23 expressly refers to 'documents' and that the scope of the provision should not be extended to oral testimony."<sup>207</sup> It remains to be seen, however, whether this conclusion will influence English courts to moderate their scrutiny of requests for oral depositions.

#### D. Methods and procedures for taking oral testimony

Although most courts and judges seem to be applying Article 9 of the Hague Evidence Convention in an appropriate manner, this is not occurring consistently, particularly among French, Swiss, and German judges. The U.S. delegation advocated that foreign central authorities promote more consistent application of American procedures in witness examinations conducted pursuant to U.S. letters of request. The delegation also urged greater receptiveness to video depositions pursuant to Article 9 of the convention. Unlike a deposition recorded by stenographic means, a video deposition affords the fact-finder, be it a judge or jury, the opportunity to evaluate the credibility and demeanor of the witness. Videotaping can also help resolve or avoid disputes among interpreters.

The Special Commission addressed these issues in a positive manner:

The Special Commission expressed general support for the use of modern technologies to further facilitate the efficient operation of the Convention. The SC noted that there seems to be no legal obstacle to the usage of modern technologies under the Convention. However, the use of some techniques may be subject to different legal requirements in different States (e.g., obtaining the consent of all parties involved in the execution) . . . .

The SC stressed where a special method or procedure is requested for the taking of evidence (Art. 9(2)), the *exception* for methods that are "incompatible with the internal law of the State of execution or [ . . . ] impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties" should be interpreted narrowly to permit, to the greatest possible extent, the use of modern information technology.<sup>208</sup>

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Stempel, Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery 'Reform,' 64 Sum Law & Contemp Probs. 197 (2001).

<sup>207</sup>Permanent Bureau of the Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), 8.

<sup>208</sup>Permanent Bureau of the Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the

These recommendations will hopefully foster more liberal application of Article 9 of the convention, including greater receptiveness to video depositions in those countries, such as France, which have been hostile to them.

### E. Deposition postponements

The U.S. delegation raised the issue of "no show" witnesses and last-minute postponements of depositions. This generated some sympathetic discussion at the meeting, including comments by the Special Commission Chair that "judicial authorities should not adjourn hearings without taking into account the international character of the meeting."<sup>209</sup> The final Special Commission report addressed the issue in a somewhat generic recommendation that "urged States party to communicate to their Central Authorities and to the authorities receiving letters of request, the importance of expeditious execution of the requests."<sup>210</sup>

## VI. Conclusion

Turning to the question posed in the title of this paper, the workings of the Hague Evidence Convention depend to a significant degree upon the type of evidence being sought, the country from which the evidence must be obtained, the experience of the attorney for the proponent of the request, and the recalcitrance of the witness or party in possession of the evidence. Nevertheless, some general observations can be made and, in that regard, the results of the ILC survey both support and debunk some of the speculation concerning the operation of the Convention.

On the one hand, the vast majority of respondents indicated that they were "glad" they had used the Convention and would again initiate its procedures under the same circumstances. Further, notwithstanding the mantra that the convention procedures are "time-consuming," most requests seem to be executed within four months. Also, many respondents succeeded in obtaining documents, notwithstanding Article 23 reservations. In addition, U.S. lawyers are generally allowed to conduct American-style witness examinations. Sweeping generalizations that the convention

Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), ¶¶ 42, 43 (emphasis in original).

<sup>209</sup>Hague Conference on Private International Law, Proces-Verbal/Minutes (No. 5) of the Special Commission on the Practical Operation of the Service, Evidence and Legalisation Conventions, 10 (Oct. 29, 2003). The Special Commission was chaired by Peter M. Beaton, Turcan Connell, Edinburgh, and co-moderated by Christophe Bernasconi, First Secretary of the Hague Conference.

<sup>210</sup>Permanent Bureau of the Hague Conference on Private International Law, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of The Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003), ¶ 40.



procedures are "unlikely to provide efficient and effective discovery," "ineffective," or "time consuming" thus paint with too broad a brush.

Even so, critics of the Convention will find ample ammunition in the ILC survey results. A substantial number of the respondents indicated that their experience with the Convention was "less satisfactory" than they had anticipated before initiating the process. Some respondents complained of lackadaisical compulsion against "no show" witnesses, of not being able to obtain documents, of requests for depositions being rejected on the ground of "fishing," and of witness testimony being presented in a format rather unlike an American-style deposition. The Hague Evidence Convention procedures are also somewhat cumbersome as compared to discovery under the Federal Rules of Civil Procedure. Drafting a letter of request, preparing a motion for issuance of the request, obtaining translations (if required by the destination country), lining up foreign counsel, and dealing with a foreign central authority and court all involve greater hassle than simply editing a form domestic document request or deposition notice on a word processor and dropping it in the mail.

Nevertheless, the relative expedience of Federal Rules discovery should not be overstated.<sup>211</sup> Any litigator accustomed to American discovery rituals—extended discovery deadlines, postponed deposition dates, broad objections to document requests, threats of motions to compel, "good faith" conferences, and, not infrequently, intervention by the trial court—can affirm that discovery under the Federal Rules can also be "cumbersome" and "time-consuming."<sup>212</sup> Indeed, one court has observed that "the major obstacle to the effective use of Convention procedures by litigants and the courts is the fact that we are less familiar with those procedures than with the discovery provisions of the Federal Rules."<sup>213</sup> There is some merit to that observation. Some of the problems cited in this chapter can be

<sup>211</sup>See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 562, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987) (observing that Federal Rules discovery is "not known for placing a high premium on either speed or cost-effectiveness").

<sup>212</sup>Discovery actually proceeds smoothly in most U.S. cases. See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. Rev. 525, 527 (1998). The point here is that while horror stories can be mustered to depict the "cumbersome" and "time-consuming" nature of the Hague procedures, the same is also true of Federal Rules discovery.

<sup>213</sup>*Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 38, 9 Fed. R. Serv. 3d 301 (N.D. N.Y. 1987).

avoided by foresight in drafting the letter of request and involving foreign counsel early in the process.<sup>214</sup>

Not all problems can be overcome by careful lawyering, however. To cite the most obvious example, if the foreign country has entered a broad Article 23 reservation, no documents will be obtained, regardless of how skillfully the letter of request is crafted. Even a "limited" Article 23 reservation will sometimes thwart a party seeking documents that are material to the litigation and known to exist but which the party is unable to identify with the requisite specificity. These problems and others noted in the survey seem to confirm the wisdom of the *Aerospatiale* Court's unanimous rejection of a rigid per se rule requiring first use of the convention procedures.

Yet, despite such problems, the ILC survey also suggests that the Convention procedures are more effective than commonly assumed by most American courts when applying the *Aerospatiale* comity analysis, and that it would not "thwart the interests of our court system"<sup>215</sup> if use of the Convention procedures were given more serious consideration. This would not necessarily require adoption of the presumptive first use rule espoused by Justice Blackmun in *Aerospatiale*. Other possibilities include a more limited presumptive first use rule that would be triggered only when certain defined foreign sovereign interests are at stake,<sup>216</sup> or presumptive first use of the Convention for jurisdictional discovery,<sup>217</sup> or even a case-by-case comity analysis that does not simply assume the ineffectiveness of the Convention. A discussion of the policy pros and cons of these measures, or of other more ambitious proposals,<sup>218</sup> is beyond the scope of this article, but greater use of the Convention, by whatever means, might reduce some of the international friction that results from American discovery demands for evidence located in another sovereign state.<sup>219</sup> It would certainly more closely reflect "the spirit of cooperation in which a domestic tribunal approaches

<sup>214</sup>See Glenn P. Hendrix, Ten Rules for Obtaining Evidence from Abroad, *The International Litigation Deskbook: Strategies and Practice in Cross-Border Disputes* 103-120 (Barton Legum ed., forthcoming 2005).

<sup>215</sup>In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994, 172 F.R.D. 295, 310 (N.D. Ill. 1997).

<sup>216</sup>See Andrew N. Vollmer, Revive The Hague Evidence Convention, 4 *Ilssa J.Int'l & Comp.L.* 475, 482 (1998).

<sup>217</sup>Jenia Iontcheva, Sovereignty On Our Terms, 110 *Yale L.J.* 885 (2001).

<sup>218</sup>See Gary B. Born, The Hague Evidence Convention Revisited: Reflections on its Rule in U.S. Civil Procedure, 57 *Law & Contemp. Probs.* 77, 90-92 (1994) (advocating a "reworking of the basic terms of the Hague Evidence Convention").

<sup>219</sup>"No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." *Restatement (Third) of Foreign Relations Law of the United States* § 442, Rptr. n.1 (1987). See also Richard L. Marcus, Retooling American Discovery for the Twenty-First

the resolution of cases touching the laws and interests of other sovereign states."<sup>220</sup> From a more pragmatic standpoint, such an approach might also have the beneficial effect of causing foreign countries to apply the Convention in a more liberal manner, as by fully implementing the recommendations of the 2003 Special Commission.

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Century: Toward a New World Order, 7 Tul. J. Int'l & Comp. L. 153, 154-155 (1999) ("America's 'unique' discovery apparatus has raised hackles abroad. The American indifference to the procedural regime of the Hague Convention suggests that it persists in its Lone Ranger attitude in the area.").

<sup>220</sup>*Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543 n.27, 107 S. Ct. 2542, 96 L. Ed. 2d 461, 7 Fed. R. Serv. 3d 1105 (1987).